

136 700472  
**CLERK'S COPY.**

**TRANSCRIPT OF RECORD**

---

---

**Supreme Court of the United States**

**OCTOBER TERM, 1945**

**No. 198**

---

**M. KRAUS & BROS., INC., PETITIONER,**

**vs.**

**THE UNITED STATES OF AMERICA**

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE SECOND CIRCUIT**

---

---

**PETITION FOR CERTIORARI FILED JULY 5, 1945.**

**CERTIORARI GRANTED OCTOBER 8, 1945.**

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 198

M. KRAUS & BROS., INC., PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE SECOND CIRCUIT

## INDEX

	Original	Print
Proceedings in U. S. C. C. A., Second Circuit	1	1
Statement under rule 13	1	1
Record from D. C. U. S., Southern District of New York	3	2
Information (No. C 117-64)	3	2
Information (No. C 117-65)	8	6
Docket entries	13	10
Statement of evidence	16	12
Caption and appearances	16	12
Government's opening	17	13
Witnesses for Government:		
Abraham Mandel—		
Direct	19, 29	14, 22
Cross	27, 39	20, 30
Re-direct	59	47
Re-cross	65	52
George Kuenzlen—		
Direct	67	53
Cross	74	60
Re-direct	77	63
Re-cross	79	65
Manuel Cuet—		
Direct	79	65
Cross	85	70
Re-direct	85	71



## Record from D. C. U. S., Southern District of New York

Continued

## Statement of evidence—Continued

## Witnesses for Government—Continued

	Original	Print
<b>Jules Klein—</b>		
Direct	86	71
Cross	93	78
Re-direct	96	81
Re-cross	97	82
<b>Max Braverman—</b>		
Direct	97, 113	82, 96
Cross	112	96
<b>Edward S. Schubert—</b>		
Direct	118	100
Cross	121	103
<b>Harry Moskowitz—</b>		
Direct	124	106
Cross	147	126
Re-direct	153, 162	132
Re-cross	162, 163	139
<b>Samuel Zweben—</b>		
Direct	164	141
Cross	178	153
Re-direct	178, 179	153
Re-cross	179	153
<b>Paul J. Newlon—</b>		
Direct	180	155
Motions to dismiss	183	157
<b>Witnesses for defendants:</b>		
<b>David M. Bungard—</b>		
Direct	188	161
(Recalled):		
Direct	226	194
Cross	228	196
<b>Benjamin W. Reiner—</b>		
Direct	191	163
<b>Max Kraus—</b>		
Direct	192	164
Cross	207	177
Re-direct	221, 223	190, 192
Re-cross	222, 223	191
<b>Nathan Lotto—</b>		
Direct	229	197
Cross	235	203
Re-direct	246	213
Re-cross	246	213
<b>John P. Higgins—</b>		
Direct	250	216
Cross	252	218
<b>John Q. Adams—</b>		
Direct	254	219
Cross	255	221

Record from D. C. U. S., Southern District of New York—  
Continued

Statement of evidence—Continued

Witnesses for Defendants—Continued

	Original	Print
William C. Haase—		
Direct	256	221
Cross	257	222
Jerome A. Thirsk—		
Direct	259	224
Cross	259	224
Hugh Douglas—		
Direct	260	225
Cross	261	226
Re-direct	262	226
Motions to dismiss	263	228
Summation to jury on behalf of Government	265	229
Charge of the court	273	235
Requests and exceptions	283	243
Verdict	286	245
Sentence	287	246
Judgment and commitment	290	248
Notice of appeal of M. Kraus & Bros. Inc., Defendant—		
Appellant	291	249
Order extending time to file record	296	251
Stipulation, attached to foregoing order	298	252
Assignment of errors of M. Kraus & Bros. Inc., Defendant—		
Appellant	300	253
Stipulation as to exhibits	321	268
Order directing filing of record	323	268
Stipulation as to record	324	269
Clerk's certificate..... (omitted in printing)	325	
Opinion, Evans, J.	326	271
Dissenting opinion, Hincks, J.	334	277
Judgment	336	278
Clerk's certificate..... (omitted in printing)	338	
Order allowing certiorari	339	279

[fol. 1]

**IN UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

Information No. C117-64

THE UNITED STATES OF AMERICA, Plaintiff-Appellee,  
against

M. KRAUS & BROS., INC., Defendant-Appellant, MAX KRAUS,  
Defendant

Information No. C117-65

THE UNITED STATES OF AMERICA, Plaintiff-Appellee,  
against

M. KRAUS & BROS., INC., Defendant-Appellant

**STATEMENT UNDER RULE 13**

The informations in the above two entitled cases were filed on or about March 31, 1944 in the office of the Clerk of the United States District Court for the Southern District of New York.

[fol. 2] In both of the informations, each containing six counts, the defendant-appellant M. Kraus & Bros. Inc. is charged in connection with the sale by it of poultry, the price of which was regulated by Revised Maximum Price Regulation No. 269, as an integral part of such sale did unlawfully, wilfully and knowingly evade the provisions of said revised Maximum Price Regulation No. 269 and particularly section 1429.5 thereof, by demanding, compelling and requiring the purchasers to purchase another commodity, chicken feet, chicken skin or gizzards as a condition of the sale to them of the aforesaid poultry in violation of Title 50 App. Sec. 901, *et sequi* and the Rules, Regulations and Orders adopted and issued thereunder.

In information No. C117-64, Max Kraus was named as co-defendant.

On April 17, 1944 the defendants were arraigned and pleaded not guilty. The trial of both informations jointly was commenced on May 23, 1944 before Hon. John W. Clancy, United States District Judge and a Jury in the

Southern District of New York. On May 25, 1944 at the conclusion of the Government's case, count 5 of information No. C117-64 was dismissed on defendants' motion. The trial was concluded on May 25, 1944.

In case No. C117-64 the defendant-appellant was found guilty on counts 1, 2, 3, 4 and 6 and was sentenced to pay a fine of \$2,500.00 on each of said counts, making a total fine of \$12,500.00. The defendant Max Kraus was found not guilty.

In case No. C117-65 the defendant-appellant was acquitted on counts 1 and 2 and found guilty on counts 3, 4, 5 and 6. A fine of \$2,500.00 was imposed on each count making a total fine of \$10,000.00.

Judgment was filed on May 25, 1944.

[fol. 3] Notice of Appeal was filed by the defendant M. Kraus & Bros. Inc. on May 29, 1944 and a Surety bond covering payment of the fine was posted on June 12, 1944.

On June 12, 1944, an order was filed extending the term of the Court and the time of the defendant-appellant to procure to be settled and to file its bill of exceptions, assignment of errors and record on appeal to September 6, 1944. The assignment of errors was filed on July 21, 1944.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF  
NEW YORK

No. C 117-64

INFORMATION

Now comes James B. M. McNally, United States Attorney for the Southern District of New York, leave having been first had and obtained, and respectfully informs this Court:

That heretofore, to wit, on or about the 24th day of November, 1943, at the Southern District of New York and within the jurisdiction of this Court, M. Kraus & Bros. Inc., a corporation duly organized and existing under and by virtue of the laws of the State of New York, and having its principal place of business at 20-10th Avenue, in the City, State and Southern District of New York, and Max Kraus, the defendants herein, in connec-

[fol. 4] tion with the sale by them on said date to Harry Moskowitz of 875 pounds of poultry, the price of which was regulated by Revised Maximum Price Regulation No. 269, duly issued by the Price Administrator, and as an integral part thereof, unlawfully, wilfully and knowingly evaded the provisions of said Revised Maximum Price Regulation No. 269, Sec. 1429.5, by demanding, compelling and requiring the said Harry Moskowitz to purchase a commodity, to wit, 427 pounds of chicken feet at 15 cents per pound as a condition of the sale to him of the said aforesaid poultry; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50, App. § 901, *et seq.*, United States Code, and the Rules, Regulations and Orders duly adopted and issued thereunder).

#### Second Count

And the said United States Attorney, in manner and form as aforesaid, further respectfully informs this Court:

That heretofore, to wit, on or about the 24th day of November, 1943, at the Southern District of New York and within the jurisdiction of this Court, M. Kraus & Bros., Inc., a corporation duly organized and existing under and by virtue of the laws of the State of New York, and having its principal place of business at 20—10th Avenue, in the City, State and Southern District of New York, and Max Kraus, the defendants herein, in connection with the sale by them on said date to Max Braverman of 104 pounds of poultry, the price of which was regulated by Revised Maximum Price Regulation No. 269, duly issued by the Price Administrator, and as an integral part thereof, unlawfully, wilfully and knowingly [fol. 5] evaded the provisions of said Revised Maximum Price Regulation No. 269, Sec. 1429.5, by demanding, compelling and requiring the said Max Braverman to purchase a commodity, to wit, 5 pounds of chicken feet at 20 cents per pound as a condition of the sale to him of the aforesaid poultry; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50 App. § 901, *et seq.*, United States Code, and the Rules, Regulations and Orders duly adopted and issued thereunder).

### Third Count

And the said United States Attorney, in manner and form as aforesaid, further respectfully informs this Court:

That heretofore to wit, on or about the 24th day of November, 1943, at the Southern District of New York and within the jurisdiction of this Court, M. Kraus & Bros., Inc., a corporation duly organized and existing under and by virtue of the laws of the State of New York, and having its principal place of business at 20—10th Avenue, in the City, State and Southern District of New York, and Max Kraus, the defendants, herein, in connection with the sale by them on said date to Max Braverman of 106 pounds of poultry, the price of which was regulated by Revised Maximum Price Regulation No. 269, duly issued by the Price Administrator, and as an integral part thereof, unlawfully, wilfully and knowingly evaded the provisions of said Revised Maximum Price Regulation No. 269, Sec. 1429.5, by demanding, compelling and requiring the said Max Braverman to purchase a commodity, to wit, 5 pounds of chicken feet at 20 cents per pound, as a condition of the sale to him of the aforesaid poultry; against the peace of the United States and [fol. 6] their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50, App. § 901, *et seq.*, United States Code, and the Rules, Regulations and Orders duly adopted and issued thereunder).

### Fourth Count

And the said United States Attorney, in manner and form as aforesaid, further respectfully informs this Court:

That heretofore, to wit, on or about the 24th day of November, 1943, at the Southern District of New York and within the jurisdiction of this Court, M. Kraus & Bros. Inc., a corporation duly organized and existing under and by virtue of the laws of the State of New York, and having its principal place of business at 20—10th Avenue, in the City, State and Southern District of New York, and Max Kraus, the defendants herein, in connection with the sale by them on said date to Max Braverman of 105 pounds of poultry, the price of which was regulated by Revised Maximum Price Regulation No. 269, duly issued by the Price Administrator, and as an



integral part thereof; unlawfully, wilfully and knowingly evaded the provisions of said Revised Maximum Price Regulation No. 269, Sec. 1429.5, by demanding, compelling and requiring the said Max Braverman to purchase a commodity, to wit, 5 pounds of chicken feet at 20 cents per pound as a condition of the sale to him of the aforesaid poultry; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50, App. § 901, *et seq.*, United States Code, and the Rules, Regulations and Orders duly adopted and issued thereunder).

[fol. 7]

Sixth Count

And the said United States Attorney, in manner and form as aforesaid, further respectfully informs this Court:

That heretofore, to wit, on or about the 24th day of November, 1943, at the Southern District of New York and within the jurisdiction of this Court, M. Kraus & Bros., Inc., a corporation duly organized and existing under and by virtue of the laws of the State of New York, and having its principal place of business at 20—10th Avenue, in the City, State and Southern District of New York, and Max Kraus, the defendants herein, in connection with the sale by them on said date to Sam Zweben of 378 pounds of poultry, the price of which was regulated by Revised Maximum Price Regulation No. 269, duly issued by the Price Administrator, and as an integral part thereof, unlawfully, wilfully and knowingly evaded the provisions of said Revised Maximum Price Regulation No. 269, Sec. 1429.5, by demanding, compelling and requiring the said Sam Zweben to purchase a commodity, to wit, 226 pounds of chicken feet at 15 cents per pound as a condition of the sale to him of the aforesaid poultry; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such cases made and provided (Title 50, App. § 901, *et seq.*, United States Code, and the Rules, Regulations and Orders duly adopted and issued thereunder).

James B. M. McNally, United States Attorney.

[fol. 8] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

No. C 117-65

INFORMATION

Now comes James B. M. McNally, United States Attorney for the Southern District of New York, leave having been first had and obtained, and respectfully informs this Court:

That heretofore, to wit, on or about the 4th day of November, 1943, at the Southern District of New York and within the jurisdiction of this Court, M. Kraus & Bros., Inc., a corporation duly organized and existing under and by virtue of the laws of the State of New York, and having its principal place of business at 20—10th Avenue, in the City, State and Southern District of New York, the defendant herein, in connection with the sale by it on said date to Harry Mandel of 421 pounds of poultry, the price of which was regulated by Revised Maximum Price Regulation No. 269, duly issued by the Price Administrator, and as an integral part thereof, unlawfully, wilfully and knowingly evaded the provisions of said Revised Maximum Price Regulation No. 269, Sec. 1429.5, by demanding, compelling and requiring the said Harry Mandel to purchase a commodity, to wit, 14 pounds of gizzards, at \$.30 per pound as a condition of the sale to him of the aforesaid poultry; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such [fol. 9] case made and provided (Title 50 App., §901, *et seq.*, United States Code, and the Rules, Regulations and Orders duly adopted and issued thereunder).

Second Count

And the said United States Attorney, in manner and form as aforesaid, further respectfully informs this Court:

That heretofore, to wit, on or about the 10th day of November, 1943, at the Southern District of New York and within the jurisdiction of this Court, M. Kraus & Bros., Inc., a corporation duly organized and existing under and by virtue of the laws of the State of New York, and having its principal place of business at 20—10th Avenue, in the



City, State and Southern District of New York, the defendant herein, in connection with the sale by it on said date to Harry Mandel of 421 pounds of poultry, the price of which was regulated by Revised Maximum Price Regulation No. 269, duly issued by the Price Administrator, and as an integral part thereof, unlawfully, wilfully and knowingly evaded the provisions of said Revised Maximum Price Regulation No. 269, Sec. 1429.5, by demanding, compelling and requiring the said Harry Mandel to purchase a commodity, to wit, 100 pounds of chicken feet at \$.15 per pound as a condition of the sale to him of the aforesaid poultry; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50 App., §901, *et seq.*, United States Code, and the Rules, Regulations and Orders duly adopted and issued thereunder).

[fol. 10]

### Third Count

And the said United States Attorney, in manner and form as aforesaid, further respectfully informs this Court:

That heretofore, to wit, on or about the 22nd day of November, 1943, at the Southern District of New York and within the jurisdiction of this Court, M. Kraus & Bros., Inc., a corporation duly organized and existing under and by virtue of the laws of the State of New York, and having its principal place of business at 20—10th Avenue, in the City, State and Southern District of New York, the defendant herein, in connection with the sale by it on said date to Sam Zweben of 358 pounds of poultry, the price of which was regulated by Revised Maximum Price Regulation No. 269, duly issued by the Price Administrator, and as an integral part thereof, unlawfully, wilfully and knowingly evaded the provisions of said Revised Maximum Price Regulation No. 269, Sec. 1429.5, by demanding, compelling and requiring the said Sam Zweben to purchase a commodity, to wit, 100 pounds of chicken skin at \$.30 per pound as a condition of the sale to him of the aforesaid poultry; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50 App., §901, *et seq.*, United States Code, and the Rules, Regulations and Orders duly adopted and issued thereunder).

## Fourth-Count

And the said United States Attorney, in manner and form as aforesaid, further respectfully informs this Court:

That heretofore, to wit, on or about the 24th day of November, 1943, at the Southern District of New York and [fol. 11] within the jurisdiction of this Court, M. Kraus & Bros., Inc., a corporation duly organized and existing under and by virtue of the laws of the State of New York, and having its principal place of business at 20—10th Avenue, in the City, State and Southern District of New York, the defendant herein, in connection with the sale by it on said date to Manuel Cuet of 211 pounds of poultry, the price of which was regulated by Revised Maximum Price Regulation No. 269, duly issued by the Price Administrator and as an integral part thereof, unlawfully, wilfully and knowingly evaded the provisions of said Revised Maximum Price Regulation No. 269, Sec. 1429.5, by demanding, compelling and requiring the said Manuel Cuet to purchase a commodity, to wit, 110 pounds of chicken feet at \$.15 per pound as a condition of the sale to him of the aforesaid poultry; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50 App., §901, *et seq.*, United States Code, and the Rules, Regulations and Orders duly adopted and issued thereunder).

## Fifth Count

And the said United States Attorney, in manner and form as aforesaid, further respectfully informs this Court:

That heretofore, to wit, on or about the 22nd day of November, 1943, at the Southern District of New York and within the jurisdiction of this Court, M. Kraus & Bros., Inc., a corporation duly organized and existing under and by virtue of the laws of the State of New York and having its principal place of business at 20—10th Avenue, in the City, State and Southern District of New York, the defendant herein, in connection with the sale by it on said [fol. 12] date to George Kuenzlen of 340 pounds of poultry, the price of which was regulated by Revised Maximum Price Regulation No. 269, duly issued by the Price Administrator, and as an integral part thereof, unlawfully, wilfully and knowingly evaded the provisions of said Revised Maximum

Price Regulation No. 269, Sec. 1429.5, by demanding, compelling and requiring the said George Kuenzlen to purchase a commodity, to wit, 75 pounds of chicken skins at \$.30 per pound as a condition of the sale to him of the aforesaid poultry; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50 App., §901, *et seq.*, United States Code, and the Rules, Regulations and Orders duly adopted and issued thereunder).

#### Sixth Count

And the said United States Attorney, in manner and form as aforesaid, further respectfully informs this Court:

That heretofore, to wit, on or about the 23rd day of November, 1943, at the Southern District of New York and within the jurisdiction of this Court, M. Kraus & Bros., Inc., a corporation duly organized and existing under and by virtue of the laws of the State of New York, and having its principal place of business at 20—10th Avenue, in the City, State and Southern District of New York, the defendant herein, in connection with the sale by it on said date to Jules Klein of 205 pounds of poultry, the price of which was regulated by Revised Maximum Price Regulation No. 269, duly issued by the Price Administrator, and as an integral part thereof, unlawfully, wilfully and knowingly evaded the provisions of said Revised Maximum Price Regulation No. 269, Sec. 1429.5, by demanding, compelling and requiring the said Jules Klein to purchase a commodity, to wit, 100 pounds of chicken feet at \$.15 per pound as a condition of the sale to him of the aforesaid poultry; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 50, App., §901, *et seq.*, United States Code, and the Rules, Regulations and Orders duly adopted and issued thereunder).

James B. McNally, United States Attorney.

## IN UNITED STATES DISTRICT COURT

Docket No. 11764

THE UNITED STATES,

vs.

M. KRAUS & BROS., INC., and MAX KRAUS  
DOCKET ENTRIES

1944

- Mar. 31 Filed Information.
- Apr. 4 Filed Notice of Appearance by Milton E. Sahn,  
Atty for both defts.
- Apr. 17 M. Kraus & Bros., Inc., pleads Not Guilty by Max  
Kraus, President.
- Apr. 17 Max Kraus pleads not guilty paroled on his own  
recognizance.
- [fol. 14]
- May 23 Trial begun before Judge Clancy—tried together  
with C117/65.
- May 24 Trial cont'd. Govt. rests. Deft. moves to dismiss,  
etc. Granted as to Ct. 5 Rest denied.
- May 25 Trial cont'd. and concluded. Verdict: M. Kraus  
& Bros., Inc., "Guilty on Counts 1, 2, 3, 4, 6.  
Max Kraus "Not Guilty" Deft. moves to set aside  
verdict etc., denied.
- Filed Judgment #45,449 Sentence Max Kraus  
& Bros., Inc., \$2,500 fine on each of counts 1, 2, 3,  
4, 6 total fine \$12,500 Fine to be paid by June  
8/1944.
- May 29 Filed Notice of Appeal by M. Kraus & Bros., Inc.,  
(notice to Clancy).
- June 12 Filed order extending time and term of Court of  
M. Kraus & Bros., Inc., to file bill of Exceptions  
etc., to and including 9/6/44.
- June 12 Filed bond on appeal to cover payment of fine  
imposed on M. Kraus & Bros., Inc.
- July 21 Filed Assignment of Errors of M. Kraus & Bros.,  
Inc.

[fol. 15] IN UNITED STATES DISTRICT COURT

Docket No. 11765

THE UNITED STATES

vs.

M. KRAUS & BROS. INC.

DOCKET ENTRIES

1944

Mar. 31. Filed Information.

Apr. 4. Filed Notice of Appearance by Milton F. Sahn,  
Atty.

Apr. 17. Pleads Not Guilty by Max Kraus, President.

1944

May 23. Trial begun tried together with C 117/65 before  
Clancy, J.

May 24. Trial continued Deft. moves to dismiss etc. de-  
nied.

May 25. Trial Continued and concluded—Verdict—Not  
Guilty on counts 1 and 2 Guilty on counts 3, 4, 5, 6. Deft.  
moves to set aside verdict etc. Denied.

May 25. Filed Judgment #45,449. Fined \$2,500 on each  
of counts 3, 4, 5, 6. Total fine \$10,000. Fine to be paid on  
June 8, 1944. Clancy, J.

May 29. Filed notice of appeal by M. Kraus & Bros. Inc.  
(see c117/64).

June 12. Filed order extending time and term of court to  
file bill of exceptions etc. to and including 9/6/44,  
Clancy, J.

June 12. See C117/64 for bond covering payment of fine.

July 21. Filed copy of assignment of errors of M. Kraus  
& Bros. Inc. (original filed in C117-64).

[fol. 16] IN UNITED STATES DISTRICT COURT, SOUTHERN  
DISTRICT OF NEW YORK

C-117-64, C-117-65

UNITED STATES OF AMERICA

VS.

M. KRAUS & BROTHERS, INC., and MAX KRAUS

**Statement of Evidence**

Before Hon. John W. Clancy, D. J., and a Jury

New York, May 23, 1944, 10:30 A. M.

APPEARANCES:

James B. M. McNally, Esq., United States Attorney, for  
the Government; by Harold J. McAuley, Esq., Assistant  
U. S. Attorney.

Milton E. Sahn, Esq., Attorney for the defendants.

(A jury was duly impaneled and sworn.)

(Twelve talesmen were placed in the jurybox.)

Mr. Sahn: May I ask your Honor if we have ten per-  
emptory challenges?

The Court: Is the statute in this trial memorandum?

Mr. McAuley: Only partially, your Honor.

[fol. 17] The Court: What is it, a misdemeanor?

Mr. McAuley: It is a misdemeanor.

Mr. Sahn: The practice, as I understand it, in the East-  
ern District, is that they allow ten on the same cases in mis-  
demeanors, and in the District of Delaware they allow ten,  
and in other districts where I have tried similar cases, your  
Honor, we have been allowed ten peremptory challenges.  
I do not know whether I will exercise them or not.

The Court: I do not know whether you are entitled to  
them. I will have to send for the statute. Do you have it  
there?

Mr. McAuley: I will get it for you.

(Short recess.)

The Court: Three challenges, Mr. Sahn.

(Whereupon a jury was duly impaneled and sworn.)

## GOVERNMENT'S OPENING

• Mr. McAuley: May it please the Court, Ladies and Gentlemen of the Jury: The Government in this case is trying two separate informations, although they both relate to the same type of transactions. In one the defendant is M. Kraus & Brothers, Inc., the corporation, and this information charges that the corporation, on six separate occasions, transacted certain business in violation of law. This information has six counts.

The second information, very similar, charges that the corporation and also Max Kraus, its president, participated in the transaction of six separate business sales, again in violation of the law, and that is why this information has six counts also.

So that both the defendant corporation and the defendant individually, are charged in this case with twelve separate transactions:

[fol. 18] Now it really can be said of this case, I think, that it is simple. There is just one issue of fact, and I do not know any reason why the Government nor the defense should for one second divert from that fact. Put colloquially, it amounts to this: Was this defendant a black market operator or wasn't he? Did he sell turkeys and chickens above the ceiling, or didn't he? That is all there is, there isn't any more.

The Government is going to present in this case no more than nine witnesses. Eight of them will be retail butchers. I will have a lot more to say about this case, its atmosphere and other things I think about it, and about you and your occupations and the part you play, in summation. I am not going to say it now. I am merely going to say this, in opening, that the Government thinks it is going to prove your case, its case, to your satisfaction—not easily, not easily.

The Government is going to put on the stand five or six witnesses who in another situation it might not put on. But I am going to question them, I am going to interrogate them and I am going to ask them about sworn affidavits which they gave, and I am entirely willing to leave it up to you to decide whether they are telling the whole truth, the half truth or any part of the truth. You will see them. You will judge their demeanor, and from the testimony of those six witnesses, plus two others, you make up your mind about whether this defendant has violated the law as it is charged.



The defendant is a wholesaler. The Government's witnesses are retailers, neighborhood butchers. It may well be, for all I know, that had these men not dealt with the defendant they would have had to give up the butcher business. I [fol. 19] don't know. Probably something will be said about that. But certainly they too are violators of the law, I must make that clear, and yet so that the whole thing won't become a farce, the OPA a laughing stock, and this office too, the Government must meet practical facts as it faces them and decide who are the ones that ought to be prosecuted and who are the ones that should not, whose participation was less culpable and whose was the more culpable.

So all of our witnesses were violators of the law in the same sense almost as the defendants. That is the Government's case. I won't burden you at this time in my opening by saying anything more except that I do hope, as per your oaths, that you will give the Government a fair trial. It is not easy for the Government to pursue this case, I assure you, but it is either pursue it or be a fool, and we are determined that we should not be fools. Thank you.

(Whereupon Mr. Sahn opened the case to the jury on behalf of the defendants.)

Mr. McAuley: Will you mark these for identification, please?

(Marked Government's Exhibits 1, 2 and 3 for identification.)

Mr. McAuley: I will call Mr. Mandel.

ABRAHAM MANDEL, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. McAuley:

Q. Mr. Mandel, what is your occupation?

A. Meat butcher.

Q. Was that your occupation on November 4th and 10th, 1943?

A. That is right.

[fol. 20] Q. Where is your place of business?



A. 134 South Fourth Avenue, Mount Vernon, New York.

Q. It is a retail store, is it?

A. A retail store.

Q. And how long have you operated that store?

A. That store has been operated from about six to seven years.

Q. How many years?

A. Six to seven.

Q. Are you the proprietor?

A. I am one of the proprietors.

Q. Who else is associated with you?

A. My brother Emanuel Mandel, and Dad.

Q. Whose job is it to make purchases in the wholesale market?

A. My job.

Q. Now do you know the defendant?

A. I certainly do.

Q. The corporation, M. Kraus & Brothers, Inc.?

A. I do.

Q. And do you know the defendant, M. Kraus, individually?

A. Right.

Q. How long have you been making purchases in the wholesale market from the firm of M. Kraus & Brothers, Inc.?

A. Well, it all goes back as far as my Dad is concerned—my father has been buying from M. Kraus there, I would say for about fifteen to twenty years at least.

Q. And how long have you individually been buying from M. Kraus & Brothers?

A. I would say there about three years.

Q. Down through the years has your mode of purchasing taken on a definite character by phone or mail or how—would you tell us how you buy?

A. Well, I go down with my truck there, down to the market there, and pick up my merchandise right there at the place.

Q. Before you go, are there any negotiations by phone or anything of that sort?

A. No. I generally go down there first and see just what [fol. 21] is going on, taking back supplies, as far as normal times are concerned—

Q. No, I haven't asked you—well, yes, I have, I beg your pardon. You would go down?

A. I would go down there and look around there and see just how prices ranged in there, and then of course I would get my particular parcels there and purchase my merchandise, whatever I need for my place of business.

Q. Did you study the market of different butchers, as well as M. Kraus & Brothers?

A. Yes, when the occasion called for it.

Q. But you have been buying poultry and chickens and turkeys for fifteen years, is that correct?

A. That is right.

Q. Would you tell me prior to November 4th and November 10th, 1943, what type of meats and poultry and other allied items were sold by you to your customers in Mount Vernon?

Mr. Sahn: That is objected to, your Honor.

The Court: Why?

Mr. Sahn: As having no bearing upon the allegations of the information, and furthermore the information does not allege any sale by the defendants to this individual witness.

The Court: Overruled.

A. Well, the type of merchandise purchasing for our particular store there, we always tried to get the best and tried to sell them the top grade merchandise wherever available.

Q. May I ask you this, is it a kosher retail butcher shop?

A. No, it is not kosher—non-kosher.

[fol. 22] Q. Do some of your customers like pork?

A. Yes, they do.

Q. Did you buy pork in November, 1943?

A. I did.

Q. Will you tell us what other items there were a demand for on the part of your buying public?

A. Well, as far as pork there—

Q. Don't elaborate. Just give me the different types of food?

A. Pork, veal, beef and poultry.

Q. Let us take the summer of 1943, the months of July, August, September and October, around that time. Was any portion of your trade asking you to furnish them with chicken feet?

A. None whatsoever.

Q. In your entire business as a butcher had there ever been a run on chicken feet?

A. Not to my knowledge.

Mr. Sahn: That is objected to.

The Court: I will sustain an objection to the form of the question.

What do you mean by a run on it?

Mr. McAuley: A demand.

The Court: Well, ask him that.

Q. Had there ever been a demand on the part of your trade for chicken feet?

A. None whatsoever.

Q. By the way, is your trade transient or steady?

A. Steady.

Q. Family trade?

A. Family trade.

Q. Telephone orders?

A. That is right.

Q. Had any of your telephone customers ever ordered chicken feet?

A. Never have.

Q. Had you bought from any butcher anywhere in the City of New York or any other place, chicken feet?

A. None whatsoever.

[fol. 23] Q. In any quantity whatsoever?

A. Did not buy one at all.

Q. Had you ever bought from any butcher—well, I will withdraw that. Had there ever been any demand among your trade for gizzards?

A. None whatsoever.

Q. Had you ever gone to the market and purchased gizzards for any of your trade?

A. I haven't.

Q. Now I show you Government's Exhibit 1 for identification, and I ask you if you recognize that invoice (handing)?

A. I certainly do. That is my signature.

Q. Where did you get it?

A. I got it from M. Kraus & Brothers.

Q. Who gave it to you in M. Kraus & Brothers?

A. I got it from the—from Nathan there, the bookkeeper at M. Kraus, who is affiliated with M. Kraus.

Q. A man known as Nathan?

A. Nathan is manager of this particular house.

Q. He is known to you as the manager?

A. That is right.

Q. In the years and months prior—in the years prior to 1943 when you went to M. Kraus & Brothers, Inc., were you given invoices by this man you refer to as Nathan?

A. That is right.

Q. Do you know if that is his first name or his last name?

A. That is his first name, so-called.

Q. I now show you Government's Exhibit 2 for identification and ask you if you recognize that invoice (handing)?

A. I certainly do.

Q. Where did you get that?

A. I got it from M. Kraus & Brothers, Inc.

Q. Which individual gave it to you?

A. Mr. Nathan himself gave it to me.

Q. On other occasion was the defendant Max Kraus nearabouts?

A. Well, that particular occasion, Mr. M. Kraus there [fol. 24] happened to be in the office there, to see just what was going on, what Mr. Nathan was doing.

Q. Was he with you or with Mr. Nathan when Mr. Nathan gave this to you; that is what I want to know.

A. If I recall there, on one particular occasion there, I think that Mr. Kraus there happened to be in the particular—at that particular time there, in handing me these particular bills, that he knew just what was going on.

Q. I show you Government's Exhibit 3 for identification and ask you if you recognize that invoice (handing)?

A. I certainly do.

Q. Do you recall the transactions of which the receipt of this invoice by you were a part?

A. That is right.

Q. You do?

A. I certainly do.

Q. Now will you take them one by one, first Government's Exhibit 1 for identification.

The Court: Will you speak up loudly, please.

Mr. Sahn: I want to know if you are offering them in evidence. You want the witness to testify as to these things and I want to see them if you are going to offer them in evidence.

Mr. McAuley: Surely (handing to counsel).

Mr. Sahn: May I ask what count this Government's Exhibit 1 for identification refers to?

Mr. McAuley: 1 and 2 in the information against the corporation alone.

Mr. Sahn: No objection.

Mr. McAuley: May they be marked, your Honor.

(Government's Exhibits 1, 2 and 3 for identification received in evidence.)

Q. Mr. Mandel, will you talk slowly and loudly, please, so that Mr. Sahn may hear the Government's case. Will [fol. 25] you tell us if you know about the transactions of which those invoices were a part, what happened, what you did, what you said, and what Mr. Kraus said, if he said anything?

A. Well, here is a particular transaction of four barrels of chickens that I had purchased. In order to get these particular four barrels of chickens at the ceiling price—

Sahn: May I ask that that be stricken out as not responsive.

Q. Will you tell us where you went, what you did when you got there, and what you said. Testify that way, please.

A. I will do that. I went down to M. Kraus & Brothers, Inc. on 14th Street, 410 West 14th Street.

Q. Were you alone?

A. I happened to be alone at that particular time.

Q. Did you drive your truck?

A. I had the driver drive down with me.

Q. All right. I assume you went inside?

A. I went inside to M. Kraus & Brothers.

Q. All right. What happened?

The Court: Is this the 4th of November?

The Witness: The 4th of November, your Honor.

A. I asked Nathan down at the place there for poultry, and of course they gave me the poultry, the four barrels of poultry, but in order to get these four barrels of poultry—

Mr. Sahn: Just a minute.

Mr. McAuley: Wait a minute.

Mr. Sahn: May I ask that that be stricken out as not responsive.

[fol. 26] The Court: I do not know whether he is stating something—just confine yourself to what you said and what Mr. Nathan or somebody else said to you.

The Witness: I will do that, your Honor.

The Court: You asked for the four barrels of poultry?

The Witness: I asked for the four barrels of poultry.

The Court: What did you say and what did he say?

The Witness: Well, he told me he would give me the four barrels of poultry on one condition, that I would have to have gizzards along with the poultry, and in order to get these four barrels I had to take marked up gizzards to my name for the purchase of these *are* four barrels.

Q. Just a minute. When you were told you would have to take gizzards, was there a conversation about price?

A. Nathan told me there was only one way that he could possibly sell these particular barrels of poultry, that I would have to be billed up on these gizzards in order to get these four barrels of poultry that I got at ceiling price.

Q. You would have to be billed up—is that b-i-l-l-e-d-u-p, is that right?

A. Billed up.

Q. Now at the time you purchased the poultry did you have a discussion about the price per pound?

A. I asked Nathan on that particular occasion there if I had to take those because I had no outlet for them or could possibly sell them.

Q. I am not talking about gizzards. I am talking about poultry?

A. Yes.

[fol. 27] Q. Or turkey. Did you have a conversation about the price you were to pay for the four barrels?

A. Well, the conversation there, as far as the conversation was concerned, it was understood there that it was ceiling price there all the way through on the four barrels of poultry.

Q. You say it was understood. Was there anything at all said?

A. There was nothing at all said at that particular time.

Q. At that time were you familiar from your trade as a butcher and your purchases of poultry with the then current ceiling prices on turkeys? Were you familiar with the ceiling prices on chickens, I beg your pardon?

A. I was familiar with the ceiling price.

Q. And as of that date, November 4, 1943, can you tell us what the price was, if you know?

Mr. Sain: Just a minute. I have no objection to the Court taking cognizance of the Maximum Price-Regulations and advising the jury as to the ceiling price of poul-



try, but I do not think this witness is qualified to testify as to the ceiling price.

The Court: Do you want to cross-examine him?

Mr. Sahn: Yes.

Preliminary Cross examination. *B.*

By Mr. Sahn:

Q. Are you familiar with Maximum Price Regulation 269?

A. Fairly well.

Q. Can you tell me under what formula the base price for poultry is set up?

A. There is only one particular way that I am familiar there of knowing, as far as this poultry end of it is concerned.

Q. That is by what people tell you?

A. No, sir, not by what people tell me.

[fol. 28] Q. You tell me what you know about it.

A. It is what is written, so far as the price ceiling is concerned, in the particular market of poultry.

Q. That is the only way you know the ceiling?

A. That is the only way I know and how it is listed.

Q. By how it is listed?

A. That is right.

Q. But you are not familiar with the price regulation itself, or with the formula set up in the price regulation to determine the ceiling?

A. As far as that end of it is concerned, there is only one way that we go about, as far as these here regulations are concerned, it is the way they are handed down to us there to look at these regulation sheets.

Q. Will you try to answer my question, Mr. Mandel. There is a formula set up in the Maximum Price Regulation under which a base price of poultry or the wholesale price of poultry is determined. Are you familiar with that formula?

A. As far as the Base formula that is handed down from Washington, as far as these prices are concerned—

Q. Yes.

A. That is what you are referring to?

Q. Are you familiar with the regulation?

A. That is right.

Q. You are?

A. I certainly am.

Q. Will you tell me, please, what the basic price for poultry in Chicago—for springs in Chicago is?

A. That end of it there I don't have to be familiar with.

Q. Don't you have to know the basic price in Chicago in order to determine the ceiling price in New York City?

A. None whatsoever.

Q. You know the regulation?

A. As far as the regulation—

[fol. 29] Q. Will you please answer my question, Mr. Mandel? I am asking you a simple question.

A. That is right.

Q. I want to know whether you—

The Court: The question you objected to originally—the reason that I allowed you to cross-examine is you had some doubt as to whether he knew the ceiling price.

Mr. Sahn: Exactly, Judge.

The Court: I don't care whether he knows the regulation or not, so long as all he is testifying to at the present time is the ceiling price, and you had better reserve the rest of your cross examination for your regular cross-examination, because I overrule your objection.

Mr. Sahn: Exception.

#### Direct Examination (continued):

By Mr. McAuley:

Q. Can you tell me from looking at this invoice of November 4th how much you paid per pound for the chickens you bought?

A. On these four barrels, the bill of November 4th, these four barrels of chickens are listed here as wholesale ceiling price of  $37\frac{1}{2}$  cents.

Q. Is there any grade of chickens specified on there?

A. There is no grade whatsoever. We take it for granted that they are grade 1 chickens.

Q. From your own recollection, what kind of chickens were you given?

A. Well, according to my—I would call them fair. I wouldn't call them top grades. I would call them fair poultry.



Q. Now at that time, November 4th, do I understand you to say that you were moving around in the market and were familiar with prices?

A. That is right.

[fol. 30] Q. Was anybody getting 40 cents a pound for the type of chicken, legitimately, the ceiling price?

Mr. Sahn: That is objected to.

The Court: What is the question?

(Question read.)

The Court: Sustained.

Q. At what time did you buy—

The Court: Can anybody get it legitimately if the ceiling price is  $37\frac{1}{2}$  cents?

Mr. McAuley: My question is 40 cents. Does he know anybody who was selling chickens he was buying then at 40 cents a pound. I am trying to show indirectly that he paid the ceiling.

The Court: Probably it is my fault. I don't understand it. He testified that the ceiling price was  $37\frac{1}{2}$  cents.

Mr. McAuley: That is correct, and I have now asked him if he shopped around other places at that time and he said yes, and I now ask him if he knew any butcher who was charging forty cents for the type of chicken which he got.

The Court: But what has that got to do with this case? Supposing everybody else in the market were, what about it?

Mr. McAuley: Well, if that were so, your Honor, it might bear on the OPA ceiling at that time. This man says he paid the ceiling, but I want to strengthen him on that point if I can. He says he paid the ceiling.

The Court: I will sustain the objection.

Mr. McAuley: All right.

[fol. 31] Q. Did you have any conversation at all about the price of  $37\frac{1}{2}$  cents per pound for that type of chicken you bought in the four barrels?

A. Well, the conversation there at that particular time, we were mighty happy there to get them at that price.

Q. Don't tell me how happy you were. Just tell me—it doesn't make any difference whether you were happy or sad, but tell me whether you said anything to Nathan about

the price for chickens, or he said anything to you about the price for chickens?

A. Well, Nathan there gave me this bill there, marked it at 37½ cents, ceiling, and he told me there was only one possible way of acquiring this particular poultry for 37½ cents, providing I had to have gizzards along with that.

Q. What did you say?

A. I objected very—

Q. What did you say? Don't tell us you objected. What did you say?

A. I told him I couldn't use the gizzards there, it was impossible for me to use the gizzards. Well, he said, there is only one way you can get this poultry, by taking the gizzards along with this poultry, and of course I just had to take it there, and I just couldn't say anything about it because I wanted the item.

Q. Where were the gizzards that you talked about with Mr. Nathan. Were they right in front of you the way the chickens were?

A. No, sir. They generally kept them in the ice boxes.

Q. Well, did you go in and look at the gizzards?

A. No, sir, I did not.

Q. Were you invited by Mr. Nathan to go in to look at the gizzards?

A. At no particular time was I invited in their ice box.

Q. I understand that you were presented with those two invoices, is that correct?

A. That is right.

[fol. 32] Q. And were they made out simultaneously?

A. They certainly were.

Q. Did you pay both?

A. I had to pay both.

Q. Then what happened to the chickens?

A. I put them up on my truck there and took them to my retail place.

Q. Did you pick them up, the four barrels?

A. The four barrels there were rolled right out to the truck, where my truck was backed in.

Q. Did you roll them?

A. I did not roll them. They have some helpers there that rolled them out.

Q. And the four barrels of chickens were rolled out to your truck?

A. That is right.

Q. Were any gizzards rolled out?

A. At that particular time when they were rolling the barrels out they did not roll the gizzards. The gizzards, after the barrels were on the truck—the gizzards were brought out to the truck there, on some particular occasions, and on some particular occasions I wasn't even given any gizzards.

Q. Wait a minute. I am only talking about one day, November 4th. I am talking about this one purchase. Don't tell me yet about other occasions. On this particular occasion what happened to the gizzards, if anything?

A. On this particular date there the gizzards there came—they were put on the truck after the barrels were set up on the truck there.

Q. Did you look at the gizzards?

A. I did not look at the gizzards.

Q. Do you know what kind of gizzards they were?

A. They were supposed to be chicken gizzards or turkey gizzards. I really couldn't tell you.

Q. Did you take them home with you?

A. I took them home with me.

[fol. 33] Q. Did you sell them in your store?

A. I did not sell them in the store.

Q. What did you do with them?

A. They were given over to the fat people. I had to dump these too.

Q. What do you mean by "fat people"?

A. The fat man who picked up the waste fats in the retail stores there, and I was glad to get rid of them.

Q. Did you realize any income from the fat man on the gizzards?

A. None whatsoever.

Q. Do you ever realize any income on waste products given to the fat man?

A. I certainly do. As far as the trimmings of fat they are off the beef there, and were given on different forms of fats there certain prices.

Q. But you never before had the experience of giving the fat man gizzards?

A. Never before.

Q. Did your fat man before ever ask you if you could give him any gizzards? Did your fat man ask you on prior occasions if you ever had any gizzards for him?

A. No.

Q. Now will you look at Government's Exhibit 3 and tell us if you recall the transaction represented by that invoice?

A. The four barrels right here on November 10th that were sold to me at ceiling prices, 37½ cents—

Q. Start all over again. Did you go down there alone?

A. Went down there alone there with my driver, of course, the truck backed into M. Kraus Brothers and went over to Nathan there and asked him for poultry. Of course he gave me the four barrels of poultry, rolled the four barrels of poultry out, had them on the truck there, and in order to get them at ceiling prices of 37½ cents they billed me up on the chicken feet which I did not even receive the chicken feet.

[fol. 34] Q. Just a moment. Don't rush ahead on the story. You went in and you said you wanted chickens?

A. I said I wanted chickens.

Q. Did you suggest any quantity that you wanted?

A. I asked him there for my regular mark there, whatever I would possibly get, two or three or four barrels—whatever I could possibly get.

Q. All right. Was there a discussion at all about price?

A. As far as price was concerned, we understood there, as far as ceiling price was concerned.

Mr. Sahn: If your Honor please, I must ask that you direct this witness to be more responsive to these questions.

The Court: I think he is responsive.

Mr. Sahn: He comes out long before I can object.

The Court: I think he is responsive to the question. The last one is stricken out.

You cannot testify to what you understood. Testify to the conversation. You knew that the price was 37½ cents?

The Witness: Yes.

The Court: You did not dicker at all with him?

The Witness: I did not dicker at all with him.

Q. All right. What else was said on that occasion?

A. And he told me in order to get—Nathan told me in order to get these four barrels at the ceiling price of 37½ cents, he would have to mark me up the chicken feet.

Q. Are you sure that Nathan used the words "ceiling price" in his comments to you?

A. There are many particular occasions that he had.

[fol. 35] Mr. Sahn: I ask that that be stricken out as not responsive.

Mr. McAuley: Sure it is. It could not be more responsive.

Mr. Sahn: You are referring to that particular time, Mr. McAuley, on that second load of November 10th.

Mr. McAuley: That is right.

Mr. Sahn: And the witness said on many times he thinks he did speak to him about it. What did he say on November 10th?

Q. November 10th, in your conversation about chicken feet, in his comments to you did Nathan use the term, "ceiling price"?

A. Nathan used the term "ceiling price."

Q. You are certain of that?

A. Certain of it.

Q. And did he use the term "ceiling price" in connection with billing you up?

A. That is right.

Q. All right. What did he say, what else?

A. And told me there was only one way of owning the four barrels of poultry, that he would have to mark me up the 20 pounds of chicken feet which I never received.

Q. At that time did you see the chicken feet?

A. I did not see the chicken feet.

Q. Did you have an opportunity on that occasion to look all about the premises?

A. On any particular occasion that we came down to Mr. Kraus's place why there was only one place there where we were admitted. It right to the entrance or the door where the bookkeeper is and where Nathan generally stood, and we got our bills, and that is all we were able to go.

Q. You mean you were not permitted to go into the body of the store and look over the chickens in the barrel?

A. At no particular time.

[fol. 36] Q. You did not even have a view of the enclosure—I mean in front of the icebox?

A. Well, it is right in the back of the place there, and that is as far as the iceboxes—I would say they are about 25 or 30 feet beyond the entrance of the store, and we couldn't—you couldn't see the chickens there as far as it goes. They just rolled out the barrels and that was all, and that was the end of it. We just had to take it for granted that they were top grade chickens and that was all.

Q. Did you inquire at any subsequent time about the chicken feet?

A. I never inquired about that.

Q. On your subsequent visits to the place did Nathan say anything to you about the chicken feet?

A. Had mentioned to me about these chicken feet there in order to get poultry, I would have to take chicken feet, to be marked out on the bill.

Q. Is it correct, is it fair to state, Mr. Mandel, that among some Jewish people chicken feet are occasionally used as a delicacy or for the making of soup?

A. Not as a delicacy. Jewish people will take the feet that are given from their own particular poultry there, and put them in there and use it as a stock, to make the soup richer.

Q. Have you ever heard of Jewish people going out and buying chicken feet separately in volume?

A. None whatsoever.

Mr. Sahn: That is objected to. Now, Judge, will you direct this witness when he sees me rise to make an objection, not to rush out with his answer.

The Court: Yes.

Mr. Sahn: He seems to be too anxious to testify.

That is objected to. The witness has already testified that he runs a non-kosher butcher shop, and he has no experience here.

[fol. 37] The Court: Is there any reason for confining that question to Jewish people, because everybody does it.

The Witness: I certainly do, your Honor. My uncle has a kosher butcher shop and I have seen it time and again; and take my own mother, I saw it on many particular occasions as well.

The Court: I know, but counsel is objecting here. Do Christians use them also?

The Witness: Sometimes. Some Gentile people will use it, too.

The Court: Is that the reason for your objection?

Mr. Sahn: No. I have no objection. Let it go in.

Q. Now you took the chickens home on this occasion, November 10th, is that correct?

A. That is right.

Q. Of course these two items are on the one bill, is that correct?

A. That is right.

Q. Now here are two items on two separate bills.

A. Yes.

Q. Did you pay the total amount indicated on that bill?

A. I paid the total amount indicated on the bill of November 10th.

Q. Did Mr. Nathan make any effort to roll out some chicken feet to your truck?

A. On this particular bill, no, none whatsoever.

Q. Were these two transactions the only two transactions of that type which you had at that time?

A. I have had other transactions with M. Kraus & Brothers at the Fourteenth Street market.

Q. At or about that time?

A. Around about that time.

Q. Do I understand it was your habit to go there twice a week?

A. About twice a week.

[fol. 38] Q. For the purchase of poultry?

A. That is right.

Q. So that these two transactions would represent only what you did in one week, is that correct?

A. That is right.

Mr. Sahn: That is objected to, your Honor.

The Court: Overruled.

Mr. Sahn: Not being within the issues.

The Court: Overruled.

Q. And the week before and the week after, and the second week before and the second week after, was the procedure the same or different?

A. The procedure was the same.

The Court: I don't understand that question. Do you mean that Nathan insisted on his buying gizzards and chicken feet?

Mr. McAuley: Gizzards or chicken feet.

The Court: Did he? Did Nathan insist on them in the weeks before and the weeks after?

The Witness: That is right, your Honor.

The Court: And you did?

The Witness: I had to.

The Court: And you did?

The Witness: I did.



Q. You were in my office on the afternoon of April 19th?

A. Yes, Mr. McAuley.

Q. Had you been to M. Kraus & Brothers the day before, on April 18th?

A. I think I had.

Q. The same thing or different?

A. The same thing.

Mr. McAuley: That is all.

[fol. 39] Cross-examination.

By Mr. Sahn:

Q. Mr. Mandel, whom did you say you were in business with?

A. My brother and my father.

Q. What is your brother's name?

A. Emanuel Mandel.

Q. And how long have you been in business with your father and your brothers?

A. How long I have been in business with my father and my brother?

Q. Yes.

A. Well, I have been in business with my father there, at least, about twenty years with my father.

Q. How old are you?

A. Thirty-four.

Q. You have been in business with your father for twenty years?

A. That is right.

Q. Under what name do you conduct your business establishment?

A. At the present time? It is under Ideal Meat Company.

Q. And was it under the name—

A. It was under the name of Ideal Food Stores at one time.

Q. Was it under the name of Ideal Food Company at that time, in November?

A. Not Food Company—Food Stores, Inc.

Q. At that time it was a corporation?

A. That is right.

Q. So that on November 4th and November 10th in connection with the transactions that you have discussed,



covered by Government's Exhibits 1, 2 and 3, your place of business was under a corporate name?

A. In November, yes.

Q. You are sure of that?

A. Yes.

Q. It was not under Harry Mandel's name, was it?

A. Not at any particular time.

Q. Never at any particular time?

A. No.

Q. And Harry Mandel did not do the buying in November, did he?

A. No, he did not.

[fol. 40] Q. You did the buying?

A. I did the buying.

Q. A. Mandel?

A. That is right.

Q. You are sure of that?

A. Positive.

Q. Are you sure that Harry Mandel did not buy any of these items of poultry or gizzards or chicken feet?

A. That is right.

Q. Now you said that on November 4th you came down and you saw Nathan?

A. That is right.

Q. And you referred to the salesman of the defendant corporation, is that right?

A. Yes, to the manager.

Q. To the manager?

A. That is right.

Q. He is not in court at this particular moment, is he?

A. No, I do not see him.

Q. He is not here, is he?

A. Well, I just wanted to make sure.

Q. Now you got as far as the door of the place of business?

A. That is right.

Q. Is the door right at the street line or is there an alleyway protruding in?

A. Would you mind repeating that question again?

Q. Is the door to the place of business at the street line, at the building line, I should say, or is there an alleyway protruding between two windows?

A. There is slightly an alleyway between two windows.

Q. There is an alleyway?

A. That is right.

Q. And how deep would you say that alleyway was?

The Court: Are you two men talking about the store entrance?

Mr. Sahn: I am talking about the store entrance.

The Court: Well, don't call that an alleyway. We understand an alleyway to be a street.

[fol. 41] Q. All right. How deep would the entrance be?

A. From the window to the entrance there?

Q. That is right?

A. Probably a few feet.

Q. A few feet?

A. Yes.

Q. You would say no more than three or four feet?

A. That is around that.

Q. All right. Now did you get past the window on up to the door on November 4th?

A. That is right.

Q. What happened when you got to the door?

A. That is generally where Mr. Nathan just generally stands right there.

Q. Mr. Nathan stands right there?

A. That is right.

Q. Is it a single door or a double door?

A. It is a double door.

Q. It is a double door?

A. If I recollect, yes.

Q. And did Mr. Nathan stand in the center of the double doors, blocking the entrance to the place?

A. Right by the doors there which the office there generally meets the door, Nathan generally stands in the corner; never in the center of the entrance.

Q. The office is a separate partitioned place on the left-hand side of the door, isn't it?

A. That is right.

Q. And the office is off the door, isn't it?

A. That is right.

Q. Now Mr. Nathan stands at the side of the door near the office?

A. That is right.

Q. Did he prevent you from going into the stall?

A. He did not prevent me.

Q. Did he ask you—did you ask him if you could go in?

A. I did not ask him at all.

Q. He did not stop you from going in?

A. It was understood that you could not go in there.

[fol. 42] Mr. Sahn: Your Honor, I must ask you to admonish this witness.

The Court: What do you mean by that?

The Witness: Pardon me, your Honor?

The Court: What do you mean—what do you understand that to mean when you *you* say understood you couldn't go in?

The Witness: Well, because the iceboxes there, as a rule, your Honor, it was darkened up there.

The Court: You mean from patronizing this place over a period of time you knew that you weren't allowed to go in there?

The Witness: That is right, your Honor.

Q. And where is the icebox in this place?

A. It is about directly straight ahead there—I would say about 25 or 30 feet straight ahead of the place.

Q. About 25 or 30 feet. In other words, you have about 25 or 30 feet of store and let us say the store is behind this railing (indicating) or further, and then you have the iceboxes?

A. That is right.

Q. A refrigerator?

A. That is right.

Q. And that refrigerator covers up, I believe, practically the entire rear of the premises?

A. That is right.

Q. Now you say it is sort of understood that you cannot go into that stall into the iceboxes?

A. Yes.

Q. Before you said you could not get into the stall—into the store itself?

A. I did not say that I couldn't get into the store itself.

Q. Did anybody ever stop you from getting into the iceboxes?

A. There might have been on one or two occasions.

Q. There might have been. Now you said before, or at least I thought you said before that you were stopped at [fol. 43] the door, at the entrance to the store. I believe

you told me that you were stopped from going into the ice-boxes but you could go into the store. Now tell me which one of those stories is correct. I would like to get it correct.

A. I did not tell you that I was stopped at the entrance to the iceboxes where generally Mr. Nathan stands right at the corner of the place—that is where I had to see the man.

Q. That is where you had to see him?

A. That is right.

Q. But didn't you tell me that nobody stopped you from going into the store itself?

A. Nobody stopped me from going in.

Q. Didn't you tell Mr. McAuley that you couldn't go into the store?

A. I told Mr. McAuley that it was understood I couldn't go into the iceboxes there.

Q. That was a sort of verbal understanding because you say you were stopped once or twice?

A. That is right.

Q. When?

A. On particular occasions there that I was—that I was ready to walk down to the back there, by some of the help in the place.

Q. Tell me when? See if you can refresh your recollection. Was it this year?

A. Probably about three months back.

Q. Three months from today?

A. Around that time when I was getting poultry.

Q. That would be around February?

A. Around that.

Q. Did you ever try to get into the icebox in November?

A. In November?

Q. Yes.

A. No.

Q. So you weren't stopped from going into the icebox in November?

A. When I happened to be stopped at the time in February, around there.

[fol. 44] Q. I beg your pardon. Do you want to continue?

A. But the point was that we could not go near the icebox.

Q. But you weren't stopped from going into the icebox until February of 1944, I believe, that these occur-

rences you testified about, the sales, occurred in November of 1943; you weren't stopped from going to the ice box—

The Court: What is the good of whether or not he was stopped from going to the icebox?

Mr. Sahn: I think the credibility of this witness is such that it must be attacked on every aspect of his testimony, your Honor. The witness testified that he was not allowed to go into the icebox.

The Court: Well, I think you have gone far enough on that, if that is what it is attempted for.

Q. Now on November 4th you testified you saw Mr. Nathan or Mr. Nathan Lotto?

A. That is right.

Q. And you asked him for chickens?

A. That is right.

Q. And Mr. Lotto told you that you had to take some gizzards?

A. That is right.

Q. You did not want to take the gizzards?

A. That is right.

Q. You testified that you did not look at the gizzards?

A. That is right.

Q. You testified that you had your own truck?

A. That is right.

Q. These gizzards were put on your truck, weren't they?

A. That is right.

Q. Did you try to look at the gizzards on your truck?

A. The door was shut there and we just had to go away from that spot.

[fol. 45] Q. Oh, they kicked you away from the spot, too?

A. I did not say they kicked us away from the spot. It is just that we shut the doors and once I get in the front seat there I am ready to go home.

Q. But you could have gone to the rear of the truck and looked at the gizzards?

A. Well, it is understood at any particular time—

Q. You just did not want to look at the gizzards?

A. Because I had no use for them.

Q. Now you testified that you paid the ceiling price for the chickens?

A. That is right.

Q. And how much did you pay for the gizzards?

A. For the gizzards? Whatever is marked right there—  
20 cents.

Q. Thirty.

A. How much?

Q. 30 cents a pound.—

A. Whatever is marked right there. May I see the bill.

(Bill handed to witness.)

That is right.

Q. And you got 14 pounds of gizzards at 30 cents a pound?

A. That is right.

Q. And that is \$4.20, is that correct?

A. That is right.

Q. Can you tell me by looking at Government's Exhibit 1 how many pounds of poultry you bought and what the price of that poultry was (handing)?

A. You have there four barrels of 106, 105, 104 and 106 pounds, each respective barrel.

Q. That is 421 pounds?

A. That is right.

Q. And how much did that poultry cost you?

A. 421 at the ceiling price of 37½ cents.

Q. There is a figure of 157.88 on the bill.

A. Whatever it multiplies out.

Q. Do you think that is the price?

A. Of what?

[fol. 46] Q. Of the 421 pounds.

A. Whatever it multiplies out there.

Q. Will you multiply it, please?

A. May I have a pencil, please?

The Court: Well, is it the result of that multiplication?

The Witness: Is it the result of that multiplication?

Mr. Sahn: Pardon?

The Court: Is it the result—

Mr. Sahn: That is the correct figure.

A. Then that is correct.

The Court: What is the use of having the witness do it.

Q. Do you know that the maximum price regulation—  
I will withdraw that question. Do you know you are subject  
to a Maximum Price Regulation No. 269 in the purchase of  
your poultry and poultry items?

A. Yes, sir.



Q. I believe you testified before that you were somewhat familiar with that regulation?

A. Fairly.

Q. Do you know that that regulation provides for the sale of gizzards at a maximum price on gizzards?

A. None whatsoever.

Q. The regulation does not provide for the sale of gizzards?

A. As far as—when you are eviscerating poultry—

Q. Will you answer my question?

A. Not when poultry is sold whole in barrel there, on that particular way. Under a visceration, yes.

[fol. 47] Q. Now, Mr. Mandel, you cannot sell a whole chicken and still have the gizzard, can you?

A. Well, according to that particular form there gizzards are not under the regulations, as far as the straight poultry is concerned.

Q. Let me ask you this question: under the regulation do you know whether I can sell a customer in my store a gizzard or a pound of gizzards alone without the sale of any other part of the chicken? Do you know or don't you know?

A. Yes, surely you can.

Q. I can?

A. Certainly.

Q. Do you know that the regulation provides for such type of sales?

A. Certainly they do.

Q. Do you know that the regulation provides for a maximum price for the sale of gizzards?

A. Offhand there I would say no.

Q. You would say no. So that if I were to show you or it were to be proven to you that the regulation did contain a ceiling price for gizzards, you would say that you did not know what the regulation contained?

A. On that particular item, yes.

Q. On that particular item.

Mr. Sahn: Will the Government counsel concede, or will the gentlemen from the OPA, that there is a maximum base price fixed by M. P. R. 260 on gizzards?

Mr. McAuley: What, retail sales?

Mr. Sahn: In the whole.

Mr. McAuley: Retailers to the public?

Mr. Sahn: In M. P. R. 269, which naturally covers them on the retail ceiling by giving them an increase of 17 or 21 per cent.

Mr. McAuley: I will make the concession on gizzards.

[fol. 48] Mr. Sahn: You will make the concession on gizzards.

Mr. McAuley: What is the price? Do you want to read the price into the stipulation?

The Court: Does the price of gizzards or its coverage, have anything to do with this case? As I understand it, your client is charged with having forced this man to buy gizzards in order to bill up the price. I don't care whether they are covered by the regulations or not. He is not charged with violating the price of gizzards but billing up the price of chickens.

Mr. Sahn: Because this sale of any part has always been at or below the ceiling price.

The Court: All right, you will concede it, won't you?

Mr. McAuley: Freely. The issue here, I think, your Honor, is whether the produce was wanted or wasn't wanted, so what the ceiling is I do not think is connected to this case at all, unless it is your defense—

The Court: Well, anyway, we have it now on record that all these parts of the chicken, if they want to put them on sale, were covered by a ceiling price. Go ahead to something else.

Mr. McAuley: May I ask this: At this time will defense counsel stipulate that chicken feet and chicken skin are not mentioned at all?

Mr. Sahn: I won't stipulate to that effect because chicken skin is definitely mentioned in the ceiling. It is not mentioned in M. P. R. 269 but it is fixed in making the ceiling.

Mr. McAuley: Well, if you have it, I will stipulate it.

[fol. 49] Mr. Sahn: I will give it to you after the recess or tomorrow morning, before the trial is over.

Mr. McAuley: All right.

Mr. Sahn: I will be happy to point that out to you.

Mr. McAuley: Very well.

The Court: So far I understand the stipulation has only to do with gizzards.

Mr. McAuley: That is right.

The Court: All right.

The Witness: Mr. McAuley—

Mr. McAuley: Did you read the price?

Mr. Sahn: Pardon?

Mr. McAuley: Did you read the price?

Mr. Sahn: No. I stipulated it was within the ceiling.  
If you want me to look at the price, I will.

Mr. McAuley: No.

Mr. Sahn: I believe the price is 29½ plus a cent and a half markup, or 31 cents a pound.

Do you want the price, Mr. McAuley.

Defendant Kraus: It is 29.10.

Mr. Sahn: Oh, yes, the price is 29.9 or 29.9 cents is the wholesale maximum price.

The Court: Of what?

Mr. Sahn: Plus a markup of 1½ cents per pound.

The Court: Of what?

Mr. Sahn: Of gizzards.

The Court: Well, I have no interest in that. I wouldn't care if it was fifteen dollars. You have your concession.

Mr. Sahn: I understand your ruling but Mr. McAuley has asked me to state the price on the record. That is why I brought it up.

[fol. 50] Q. Now in your place of business do you open poultry for customers?

A. We dress—we clean poultry for customers.

Q. And do you always sell poultry in a whole carcass, that is, the entire chicken, or do you sell it in parts?

A. We sell it whole.

Q. You sell it whole?

A. That is right.

Q. You do not sell chickens in parts, do you?

A. We do not sell chickens in parts.

Q. Are you familiar with the general movement in the chicken business today with regard to the purchase and sale of poultry in parts?

A. No, I am not.

Q. You are not?

A. No.

Q. Did Mr. Nathan Lotto compel you take the chickens?

A. Compel me to take the chickens?

Q. Yes, the chickens.

A. Nobody compels me to take anything.

Q. Then you weren't compelled to take the gizzards?

A. No.

Q. Is that correct?

A. That is correct.

Q. You could have refused to take them?

A. That is right.

Q. Mr. Lotto did not say "You must take these chickens and these gizzards"?

A. That is right.

Q. Did you ever offer to return the gizzards when you found you couldn't sell them?

A. On one or two occasions I have asked him that.

Q. On November 4th, on this particular occasion—

A. Not on that particular bill.

Q. Not that particular bill?

A. Not that particular bill.

Q. So that you were not compelled to buy this item covered by Government's Exhibits 1 and 2?

A. That is right.

[fol. 51] Q. You could have refused to buy?

A. That is right.

Q. Now with regard to the sale of November 10th, I believe you testified there that you were stopped at the door by Nathan?

A. That is right.

Q. What door, the refrigerator door or the entrance, sir?

A. The entrance door—the entrance between the two windows.

Q. Pardon me?

A. Just alongside where the bookkeeper's office is, right there.

Q. Did you ask Nathan for poultry?

A. I asked Nathan for poultry.

Q. How much poultry did you ask for?

A. I asked him there on my particular allotment there so that I would probably get, three or four barrels. I just wanted my share of it.

Q. How many barrels did you get?

A. Four barrels.

Q. Four barrels?

A. Yes.

Q. That is 421 pounds?

A. That is right.

Q. At 37½ cents a pound, is that correct?

A. That is right.

Q. And that figures out to the sale in dollars and cents on the other shipment, \$157.88?

A. That is right.

Q. And you also got at that time one box of chicken feet?

A. Yes.

Q. Weighing 20 pounds?

A. That is right.

Q. At 20 cents a pound?

A. That is right.

Q. For a total of \$4.00?

A. That is right.

Q. You say you did not get the chicken feet?

A. No, I did not.

Q. After you got on your truck did you notice whether you had chicken feet in the back of the truck or not?

A. Before we shut the doors, I would have to come out of the house there, I checked.

[fol. 52] Q. Did you go over to Nathan Lotto and tell him that he didn't give you the chicken feet?

A. I certainly did there.

Q. And what did he say to you?

A. Just has to be billed out that way, that is all.

Q. That is what Nathan Lotto said?

A. That is right.

Q. And he did not give you the chicken feet?

A. I did not take the chicken feet.

Q. You are sure of that?

A. Positive.

Q. Did he compel you at that time to take the chickens?

A. He did not compel me to take the chickens.

Q. You took them voluntarily?

A. I just had to —

The Court: What does that question mean? Surely there must be some meaning about it. Everybody in the room knows that nobody is compelled to buy a chicken or a fur coat or a piece of jewelry or a cigarette or anything else. What do you mean by that?

The Witness: Your Honor, can I answer that?

The Court: Just a moment.

Mr. Sahn: What do I mean by it? I want to know whether we forced him to buy this merchandise either individually or as an integral part of the sale?

The Court: Well, it is to him that way, if that is what you want him to answer. But that is not what you are asking.

Mr. Sahn: I am using the word "compel" because the word "compel" is specifically set out in the information, and I am using the language used by the Government in the information.

[fol. 53] The Court: Use the whole language of the information if you want to follow it. Don't be asking him one phrase that nobody understands.

Q. Did you pay for the chicken feet?

A. I paid for the chicken feet and the chickens.

Q. And you get a bill for the chicken feet?

A. That is right.

Q. Did you call up the office of M. Kraus & Brothers and tell them that you would not pay for the chicken feet?

A. At that particular time no, I did not call up.

Q. Did you make a complaint to the Office of Price Administration about being compelled or forced to take chicken feet and gizzards in order to get chickens?

A. That is right.

Q. Did you go up to the Office of Price Administration to make a complaint?

A. I just told, as far as Mr. McAuley was concerned there, that I couldn't get poultry there unless I took——

Q. Just a minute.

The Court: Did you go up to the office of the Administrator?

The Witness: I inquired about that, your Honor.

The Court: Did you go up?

The Witness: No, I did not go up to the office of Price Administration.

The Court: Did you——

Mr. Sahn: I beg your pardon.

The Court: Did you go down to McAuley's office?

The Witness: That is right.

The Court: You did not go to the OPA office at all?

[fol. 54] The Witness: No, I did not. I came down to Mr. McAuley's office.

The Court: All right.

Q. Before you went to Mr. McAuley's office didn't the Office of Price Administration investigator come to your place and speak to you?

A. Certainly did.



Q. And it was as a result of that conversation that subsequently you went to Mr. McAuley's office?

A. That is right.

Q. You did not voluntarily go to Mr. McAuley's office until after you got a telephone call?

A. That is right.

Q. And you did not originate the complaint in Mr. McAuley's office?

A. The complaint there—

Q. Will you answer the question?

A. I will certainly do that. The complaint there had come over to the Office of Price Administration in to Mr. Frankel, a complaint—

Q. You did not—

The Court: He means you did not start that yourself. You did nothing about this sale or these sales until an investigator from the OPA came to your shop and talked to you?

The Witness: That is right. I am sorry I misinterpreted it.

The Court: And later on you got a call from Mr. McAuley and you came to his office?

The Witness: That is right.

The Court: I will excuse the jury until five minutes after two.

(Recess until 2:05 P. M.)

[fol. 55]

Afternoon Session

ABRAHAM MANDEL resumed the stand.

Cross-examination, Continued.

By Mr. Sahn:

Q. Now, Mr. Mandel, I believe you were at that point in your testimony where you told us that you were visited in your place by an investigator from the Office of Price Administration?

A. That is right.

Q. When was this?

A. Oh, this must have been about two months back or so.

Q. Well, would you say it was in the month of February of this year?

A. I would say around February—about February—around that particular time.

Q. You are not too sure of the date?

A. I am not exactly too sure of the date.

Q. Can you tell us which part of the month it was, the early part of February or the latter part of February?

A. Offhand I couldn't say; around that particular time.

Q. But prior to the time when the investigator came down to see you, you had made no complaint about these transactions to the Office of Price Administration?

A. No.

Q. What was the name of the investigator who came down to see you?

A. It was Mr.—his last name was Frankel.

Q. Was there just one investigator or two gentlemen there?

A. It happened at one particular time there were two there—it was his assistant. I did not know the other party's name.

Q. On the first occasion there was just Mr. Frankel?

A. That is right.

Q. And did Mr. Frankel discuss any of the transactions you had with M. Kraus & Brothers, Inc.?

[fol. 56] A. Just told me just what had happened there as far as the poultry end of it, as far as the purchase.

Q. Just a moment, please. You tell me what Mr. Frankel said to you and what you told Mr. Frankel.

A. Mr. Frankel did not say anything to me there. I told Mr. Frankel there just how the poultry had to be purchased.

Q. You told Mr. Frankel something before Mr. Frankel asked you anything about it, is that what you are trying to tell us?

A. Mr. Frankel asked me, as far as the case there, of Mr. M. Kraus there, on the poultry end of it.

Q. All right. I asked you to tell this jury and the Court what Mr. Frankel said to you and what you said to him?

A. Well, Mr. Frankel just asked me there at that particular time as far as how I went about in purchasing the poultry, and naturally there I told him there just how I went about and how I had to get my poultry.

Q. Did Mr. Frankel ask you whether you bought poultry from M. Kraus & Brothers?

A. Asked me whether I bought poultry from M. Kraus & Brothers, right.

Q. You were in trouble with the Office of Price Administration, weren't you?

A. As far as my particular case I don't think it has any particular bearing on this particular case.

Q. As a matter of fact, that change of name from the individual firm to the corporate name back last September was caused by the trouble that your father was in, wasn't it?

A. I should say not.

Q. All right. Suppose you let us decide, the jury and the Judge, whether it has any bearing upon this issue. Will you tell us what trouble you had?

Mr. McAuley: I object to that, if your Honor please, not proper cross-examination.

[fol. 57] The Court: I will allow it. Was it OPA?

Mr. Sahn: Yes, Judge.

The Court: I will allow it.

A. As far as the trouble that we went through?

Q. That is right.

A. The trouble was there at the particular time there, it was hard getting merchandise and it was just one particular time there that Dad helped out some particular, we will say, one or two butchers. They came to us and they credit that their store was closing down and we helped them out on a few pieces of meat that I was taking away from my retail store.


Q. And you sold that meat to these butchers over the ceiling price?

A. Because I was paying at that time there over the ceiling price too.

Q. Will you answer my question? You sold that meat to these butchers at over the ceiling prices?

A. That is right.

Q. What happened to that case?

A. What happened to the case there? 

Q. Yes.

A. We were fined and right at the present time I am on probation.

Q. You were given six months in jail, weren't you?

A. I was given six months in jail.

Q. And your sentence was suspended?

A. That is right.

Q. And your father was given six months in jail, also?

A. He was not.

Q. Who else was given six months in jail?

A. Just my brother and myself.

Q. You and your brother?

A. That is right.

Q. When was this?

A. In March.

Q. When did this occur?

A. The sentence there?

[fol. 58] Q. That is right.

A. It was last March, sir.

Q. Last March—March of 1943?

A. That is right.

Q. At that time were you purchasing any meats or poultry from M. Kraus & Brothers, Inc.?

A. I certainly was purchasing poultry only.

Q. Poultry only, but no meats?

A. I couldn't get any meats.

Q. And when you got into trouble with the Office of Price Administration you were sentenced to six months in jail, didn't M. Kraus & Brothers stop doing business with you because you were in trouble?

A. For a period there—there was a short period there they stopped giving me merchandise.

Q. Because you were in trouble, they told you that?

A. That is right.

Q. And didn't you go to certain individuals to intercede for you through Mr. Kraus so that he should sell you poultry?

A. My uncles went to intercede for me there to speak to Mr. Kraus, to give me poultry.

Q. Did Mr. Kraus refuse to sell you any poultry because you had violated some OPA regulations and you were in trouble?

A. What particular affair was it of Mr. Kraus, then?

Q. Will you answer the question, please?

A. That is right.

Q. That's right. And when Mr. Frankel came into your store in February of 1944, he told you that you were on probation and you could get in trouble unless you gave an affidavit that he wanted, didn't he?

A. He did not tell me nothing, whatsoever.

Q. And you were afraid that you were going to go back to jail for six months unless you gave an affidavit?

A. I did not, whatsoever.

[fol. 59] Q. You knew that if you would violate your parole you would go to jail for six months, didn't you?

A. As far as that end of it; yes; as far as that goes there.

Mr. Sahn: You may examine.

Redirect examination.

By Mr. McAuley:

Q. Have you told anything in court today that you did not previously tell to Mr. Frankel?

A. There is something that I haven't told the court today there that I would like to tell the court.

Q. Go ahead.

A. As far as it goes there, in dealing, as far as my sentence is concerned, I was in a position there—I was a victim of circumstances where I couldn't get any merchandise and I had to go out and get merchandise no matter where; to uphold my particular business. It was a question there that after all the years that Dad had been in business, that of closing right down completely. We weren't out for the thing of profiteering—

The Court: Well, did you tell Frankel everything that you told us? Have you omitted to tell here anything that you told to Frankel?

The Witness: The only thing that I told Mr. Frankel in reference to this particular case there, as far as the poultry end of it is concerned, your Honor—

The Court: Yes, but—

The Witness: What I omitted to tell Mr. Frankel is what I will tell right now.

The Court: All right.

[fol. 60] Q. Did you tell everything to Frankel—did you tell Frankel the truth substantially?

A. I told Frankel the truth.

Q. And have you told the truth in court today?

A. I certainly have told the truth in court.

Q. You have never been a wholesaler, have you?

A. Pardon me?

Q. You have never been a wholesaler of poultry or meats?

A. Never a wholesaler.

Q. You are a retailer?

A. I am a retailer.

Q. Now will you look again at Government's Exhibits 1, 2 and 3 in evidence and tell me if there is anything about these two transactions which you have neglected to tell the Court and jury (hanging)?

A. Well, that we will say in this bill of November 10th, when the poultry was purchased and brought up to my place of business, I found it was short about—my uncle who is in charge of my place up there, the manager, so-called, weighed the barrels out and we found quite a shortage on the barrels, in some particular barrels as high as four and five pounds short.

Mr. Sahn: May I ask that the testimony be stricken out as incompetent, not part of the pleadings, and no allegation in the information about shortages of fowls.

The Court: Overruled.

Mr. Sahn: Exception.

Q. Did you thereafter have a conversation with anybody at M. Kraus & Brothers, Inc.?

A. Well, after my uncle had called my attention on that particular weight there, I instructed the girl to deduct for [fol. 61] that particular poundage on those barrels. When the statement came through at the end of the week for us to pay it, we went ahead there and deducted that particular amount off these barrels. The check was sent to M. Kraus & Brothers there, they received the check and the following week there I couldn't get a pound of merchandise, any poultry whatsoever from the house.

Q. You referred to the transaction of November 10th?

A. November 10th.

Q. What was the conversation at the time you say you were refused poultry?

A. I asked Nathan there why I couldn't get any poultry there, and turned around to me and said "You deducted some particular weight and that is one of the reasons I can't give you that particular poultry until you straighten out that difference." Well, I saw I was up against it and I couldn't get any place else poultry, and I paid that particular difference there.

Q. Have you told us everything that Nathan said to you at the time you discussed this alleged shortage of weight, of whether or not you should pay for the short weight?

A. Nathan told me there there was only one possible way there where I would get merchandise if I paid for the



difference that I took off on that particular weight there and told me in order to get merchandise I would have to see Mr. Kraus before he would give me permission of getting merchandise again, and I went to Mr. Kraus's office there and told him the situation there, and I told him that it was a mistake on my part, on the girl's part. I did not want to tell him that I had deducted off on the weight. I told him that there was a mistake there, that the girl had made a mistake in multiplication and so on and so forth, in order to get merchandise again.

[fol. 62] Q. What did Mr. Kraus say?

A. Mr. Kraus said, "I will speak to Nathan and see that you get three or four barrels of poultry again."

Q. And do I understand that you paid the check for the full amount?

A. That is right.

Q. Including the weight that was missing?

The Court: Aren't the barrels weighed before they are put on your truck?

The Witness: Your Honor, the barrels have the weights on there already.

Q. Even though they have the weights, are they weighed in Kraus's in front of you on a scale?

A. They do not weigh anything in front of us. We have to take the weight from the barrel.

Q. Now during the month of November and any time subsequent or any time remotely prior to November 1943, or closely prior—not remotely—did you ever buy chickens alone at Kraus's?

A. Before November there we used to get chickens and we used to get it there for the ceiling price, before that.

Q. That was chickens, and chickens only?

A. That is right.

Q. Is that correct?

A. That's right.

Q. How long prior to November 1943?

A. I would say there a year or so back prior to November.

Q. I am not asking about that long prior. I am asking about June, July, August and September, October—the summer and early fall of 1943—did you ever go there to buy chickens alone?

A. I went there to buy chickens.

Q. Did you ever succeed in buying chickens only?

A. Well, the most they probably would give me there would probably be about one or two barrels a week there. [fol. 63] That was all I was able to get from the house only.

Q. And that was chickens only?

A. Chickens only.

Q. Is that correct?

A. Yes, sir.

Q. But you said that in November, I believe you stated, that Nathan said "If you want chickens you will have to take gizzards"?

A. That is right, and chicken feet and wings and turkey livers.

Q. Nathan of course does not use the word "compel", does he, that particular word?

A. Of using "compel"?

Q. Yes.

A. No, he does not use the word "compel."

Q. He does not use the word "demand" either?

A. He does not use the word "demand" either.

Q. Did he use the word "require"?

A. Require?

Q. Did he even use that word?

A. That is right.

Q. Are you sure of that now? I want you to remember as closely as you can the exact words he said to you in connection with these gizzards and chickens. Did he actually use the word "require"?

A. Probably said there "you will have to take them" or some sort of words to that effect.

Q. Let us concern ourselves with what he told you only, not what he probably said. If you actually remember—can you remember what he said?

A. "You'll have to take the chicken feet and the gizzards there in order to get the poultry."

Q. The word "have"—h-a-v-e?

A. Yes.

Q. "Have to take"?

A. Yes.

Q. That is your recollection?

A. Yes.

Q. I would like to ask you on each of these two occasions when you went for this poultry, how long would you say you were inside the premises?

A. Sometimes I would have to wait there a half hour, three-quarters of an hour; sometimes I would wait there [fol. 64] also five or ten minutes.

Q. While you were waiting were you the only one there?

A. I wasn't the only one there.

Q. Were there other butchers there?

A. There were other butchers there.

Q. Did you see anything while you were there?

A. What I did see there that the butchers taking out barrels there, besides taking out gizzards there, is what I had to take out, too.

Q. You observed other butchers taking out poultry and taking out gizzards?

A. That is right.

Q. Is that correct?

A. That is right.

Q. Were these gizzards uncovered in the barrel?

A. These gizzards were covered in five-pound cartons.

Q. How do you know they were gizzards?

A. It was written on the boxes there.

Q. It said "Gizzards"?

A. That is right.

Q. Did you observe any other butchers on either of those occasions taking out chicken feet?

A. I have there—the chicken feet there came along there in some barrels, 90 and 100-pound barrels of chicken feet.

Q. Were the barrels covered or exposed?

A. The barrels were covered there and marked on there "Chicken feet."

Q. Stamped with some kind of stencil?

A. That is right.

Q. And you say you observed this on both the occasions we referred to, November 4th and November 10th?

A. That is right.

Q. And on other occasions at or about that time did you observe the same thing?

A. I certainly did.

Mr. McAuley: That is all.

[fol. 65] Recross examination.

By Mr. Sahn:

Q. There was no effort made by Nathan Lotto or any other employee of M. Kraus & Brothers, Inc., to hide the gizzards or the chicken feet, was there?

A. They did not hide it.

Q. They were sold openly?

A. That is right.

Q. Now let us get back to the language that Mr. Lotto used. First you said that Mr. Lotto said you were required to take chicken feet?

A. I did not say "required."

Q. Then Mr. McAuley got you to change your testimony to say that Mr. Lotto said, "You have to take chicken feet." Try to recall that conversation and tell me now what Mr. Lotto told you.

A. Mr. Lotto told me, in order to take the poultry I would have to take chicken feet and gizzards.

Q. You remember that language specifically?

A. That is right.

Q. And he said to you that you would have to take the chicken feet and the gizzards?

A. That is right.

Q. You told us about this 12-pound spread back in November when you went up to see Mr. Kraus—

A. Right.

Q. —you did not tell Mr. Kraus about a short weight, did you?

A. I certainly did tell Mr. Kraus about the—as far as the short weight was concerned, no, I did not.

Q. You did not tell Mr. Kraus you were shortweighted; you told Mr. Kraus that your bookkeeper made a mistake.

A. That is right, fearing if I told him in that respect there I may not get poultry at all.

Q. Exactly; so Mr. Kraus was never told by you that you were short-weighted.

A. That is right.

Q. As a matter of fact, Mr. Mandel, you have made that a practice of taking off weights and taking off barrels of poultry, haven't you?

A. None whatsoever.

[fol. 66] Q. Do you owe the firm of M. Kraus & Brothers for a barrel of chickens today?

A. That is just what I am coming to there. I do not owe the firm for a barrel of chickens there. I was billed out for two barrels and I was kind of busy that morning there and they threw on the third barrel, and I called back the office and I told them that I had received only three barrels, and the following day when I had noticed, I tried to get the bookkeeper back there again, and I called up Saturday and Nathan Lotto answered the phone and he said "Take it up with the bookkeeper, who will be in on Monday." I only had three barrels and I had the proof as far as my driver is concerned, and that is what they were paid for, three barrels, and that is what I am paying on.

Q. You always sign a ticket for the merchandise received, don't you?

A. That is right.

Q. But you ran off without signing a ticket that day, didn't you?

A. That is right.

Q. And the only time that you ever had a dispute about the number of barrels you purchased from M. Kraus & Brothers, Inc., was when you ran off without signing a ticket?

A. They just—for this reason I ran off without signing a ticket, because I was under the impression that there were only two barrels on there. In fact I asked Nathan Lotto there if he had—

Mr. Sahn: That is all.

Mr. McAuley: That is all.

---

[fol. 67] GEORGE KUENZLEN, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. McAuley:

Q. Mr. Kuenzlen, you are a butcher by trade?

A. Beg your pardon?

Q. You are a butcher by trade?

A. Yes.

Q. Run a retail shop?

A. Yes.

Q. Where is it?

A. 4241 Third Avenue, New York.

Q. That is in Yorkville?

A. Yes, sir.

Q. How long have you been established at that place?

A. Well, in that place about eight years, and across the way about thirty-six.

Q. And in the general neighborhood about 42 years?

A. Yes, sir.

Q. Taking a rough figure, can you give the Court and jury a fair idea of the size of your business?

A. Well, at one time we did quite a business, before 1931. Today we do about 65 to 70 thousand dollars a year.

Q. Sixty-five to 70 thousand gross business a year, is that correct?

A. That is right.

Q. Now, you are acquainted with the wholesaler, Kraus & Company, Inc?

A. Yes, sir.

Q. And how many years have you been doing business with Kraus & Company?

A. Well, I guess my father has been in and around that for about 25 or 30 years.

Q. And you personally?

A. About a year and a half.

Q. Now, what type of meats have you been used to selling in the last two or three years in your butcher shop?

A. Most choice and prime.

Q. You run a high grade butcher shop?

A. Yes, sir.

[fol. 68] Q. A lot of telephone customers?

A. Pretty near—90 per cent. of our trade, yes, sir.

Q. Have you ever had any type of demand, small medium or large, for an item known as chicken skin?

A. None.

Q. Never did?

A. None.

Q. In the last twenty years how many people, if any, have ever come into your store and asked you for any part of a pound of chicken skin?

A. None.



Q. I show you Government's Exhibit—

The Court: What street is that, No. 1241?

The Witness: 71st and 72nd streets.

Q. I show you Government's Exhibit 4 and 5 for identification and ask you if you can identify these invoices (handing)?

A. Yes, sir.

Q. You can?

A. Yes, sir. This is my signature on there.

Q. You received this from someone in M. Kraus & Brothers, Inc?

A. I was—I went down to buy the turkeys—

Q. All I am asking you about that is, did someone give you this in M. Kraus & Brothers?

A. Yes, sir.

Q. Do you know who it was?

A. It was one of the shipping clerks there.

Q. A shipping clerk?

A. Yes, sir.

Q. Had you been there before?

A. Not in that house, no, sir.

Q. Was this the occasion of your first visit to that house?

A. That is right, yes.

Q. And were these the first two invoices you had ever received from that house?

A. That is correct.

[fol. 69] Q. All right. Now, do you recall the transactions which are indicated by Government's Exhibits 4 and 5 for identification?

A. Yes, sir.

Q. Will you tell us all you recall about the transactions?

Mr. Sahn: Just a minute, Mr. Kuenzlen. May I see these?

Mr. McAuley: Yes.

(Same handed to counsel.)

Mr. Sahn: No objection.

Mr. McAuley: Will you mark them, please.

(Marked Government's Exhibits 4 and 5 in evidence.)

Q. Will you tell us, Mr. Kaenzlen, what happened?

A. I went down there to get my turkeys and I was given these boxes of turkeys and they were loaded on my truck and—

Q. Just a minute. You went down there. Had you been there before?

A. Not in that building, no, sir.

Q. You went in green?

A. Well, I went in 14th Street and they told me "you come down in the afternoon, that the truck would be unloaded in this house", and I should come down there between two and four.

Q. You mean somebody in Kraus Inc. told you that?

A. Yes, sir. I think the man's name is Nat.

Q. Nat?

A. Yes.

Q. Was that in a telephone conversation?

A. No, down in the market. Every morning I go down. I would ask "Can I have some turkeys today?"

Q. And you had this conversation with Nat in the morning?

A. Yes, sir.

Q. And you returned in the afternoon?

A. Yes, sir.

[fol. 70] Q. Is that correct?

A. He told me in the afternoon between two and four.

Q. Now tell us everything you did, everything that you said and everything that everybody else that you might have come in contact with did or said while you were buying those turkeys?

A. Well, in the afternoon about two o'clock I took my chauffeur and went down to this place on Tenth Avenue, and went in the icebox, and other retailers were standing there, and I waited till my name was called, and I was called and I had the turkeys loaded on the truck, and when I went out I signed these two papers, and when I reached outside the chauffeur said "You have three cases there." I said "What is that?" He said "Chicken skin." So then I went home with them. There was nothing said about it. I made no protest because of the condition today. I took things down in the market that I never took in my line before.

Q. Did you say to Nathan or Nat that you wanted to buy chicken skin?

A. No, sir, I did not.

Q. You are sure of that?

A. Positive.

Q. Did you load your own truck or did your chauffeur load your own truck?

A. No, Mr. Kraus's lugger, as I recall, they loaded it. My chauffeur was outside watching the truck. I was inside the icebox.

Q. You understand that what you wanted to buy was turkey?

A. Yes, sir.

Q. Now I ask you were these two bills handed to you at the one and the same time?

A. Well, I signed one after the other.

Q. Were they given to you by someone?

A. Yes, sir.

Q. Do you recall who gave them to you?

A. Well, one was given to me by a little short man and the other man was a taller man.

[fol. 71] Q. Well, do you know Mr. Kraus?

A. Yes, sir. That is Mr. Kraus there (indicating).

Q. Did he give you either of these bills?

A. No, I did not see Mr. Kraus there that day.

Q. Somebody else gave you these two bills?

A. Yes.

Q. Within the space of a few seconds both were handed to you?

A. That is correct.

Q. Is that correct?

A. Yes, sir.

Q. Now did you look at that bill?

A. Yes, sir.

Q. And is that what you wanted to buy?

A. Yes, sir.

Q. Did you have any conversation about the price per pound of this—

A. Of the turkeys?

Q. Yes.

A. No, sir.

Q. No talk at all?

A. No, sir. That was, I believe, the general price down there when I bought them at Cudahy. It was the same price.

Q. Is that Cudahy?

A. Cudahy Packing Company.

Q. At that time you had bought from other dealers in poultry?

A. Yes, sir.

Q. And at that time was this the price that was being charged by the other men from whom you bought?

A. Yes, sir.

Q. You are certain of that?

A. I am quite positive of it.

Q. All right. Now you say you had no conversation about the price?

A. No, sir.

Q. You just looked at the bill and signed it?

A. That is correct. That is my own figure on there, how I figured the price out.

Q. All right. Then you were given this?

A. Yes, sir.

Q. Did you do anything or say anything when you were given this bill?

A. No, sir. I did not say anything. I simply accepted it.

[fol. 72] Q. Did you laugh or smile or do anything in the presence of the man?

A. I had no smile on me, no, sir.

Q. You are sure of that?

A. I am positive, yes, sir.

Q. When the man gave you this bill for three boxes of skins, 75 pounds at 30 cents a pound, for a total price of \$22.50, did he say anything to you?

A. No, sir, not a word.

Q. Are you sure?

A. Yes, sir.

Q. And you drove away with your skins on your truck?

A. Yes, sir.

Q. What did you do with the turkeys?

A. I sold them and I thought to myself well—

Q. Don't tell us what you thought to yourself. You sold them, is that right?

A. I sold them.

Q. And what did you do with the skins?

A. Well, I tried to sell them to some of the trade, to make soup, so I sold about two pounds, and that is all, about all I could sell. Then the balance, we had some Sisters of the Poor come around, and I asked them if they wanted to

take it and they said yes, which I gave to them. If I recall right, one is St. Zitas Home and the other is St. Vincent's Hospital.

Q. And that is how you got rid of the skins?

A. Yes, sir.

Q. How much did you receive for the couple of pounds you did sell?

A. I sold them for what I paid for it. That is what I tried to sell them, at 30 cents a pound.

Q. Can you recall how many pounds you sold?

A. Two pounds, as I recall.

Q. Sixty cents, is that right?

A. Yes, sir.

Q. Is that correct, then, that you were out \$21.90 on what you had paid for the skins?

A. That is right.

Q. Did you ever go back to M. Kraus & Brothers, Inc.?

A. Yes, sir.

[fol. 73] Q. After this transaction?

A. Yes, sir.

Q. You have had other transactions since?

A. About twice a week.

Q. Twice a week?

A. Yes, sir.

Q. Down to the present date?

A. To the present date, yes, sir.

Q. You are still getting skins?

A. No, sir.

Q. When did that stop?

A. That was the only time I got skins.

Q. Do you get anything now?

A. Well, they ask me do I want gizzards or turkey livers. Sometimes I take gizzards and sometimes I take turkey livers.

Q. Have you been able to get turkeys without neck, feet, skin, or any part of the anatomy of the turkey?

A. No, sir.

Q. You always have to take some other part of the anatomy of the turkey?

A. Well, I have an outlet now for the gizzards and the liver.

Q. You have discovered a trade for the gizzards?

A. For the animals, there is no points on it, and turkey livers are quite in demand now.

Q. When did that demand arise as far as your trade is concerned?

A. As soon as I got the customers acquainted with it. When they asked me for something for the animals, I used to sell beef hearts, and they had to give points, and then they said "Do you have anything without points."

Q. And do I understand that dogs and cats are consuming these now?

A. Well, lately I have been buying mostly turkey livers.

Q. And those are for dogs and cats?

A. No, sir, that is for human beings there. They are quite high in price.

[fol. 74] Q. Do you buy other items in addition to turkey from Kraus Brothers?

A. Since then I haven't purchased a turkey; only chickens.

Q. Chickens?

A. Yes, sir.

Q. You are still buying chickens?

A. Yes, sir.

Q. Did you ever buy chickens and only chickens from M. Kraus Brothers Inc.?

A. No, sir.

Q. Would you like to buy just chickens if you could?

A. If possible, surely, I would.

Mr. McAuley: That is all.

Cross-examination.

By Mr. Sahn:

Q. Nobody asked you to take the chicken skins?

A. No, sir.

Q. Nobody spoke to you about them at all?

A. No, sir.

Q. Did you offer to return the chicken skins?

A. I did not, no, sir.

Q. Did you refuse to pay for them at any time?

A. No, sir.

Q. You just had them on the truck and you took them?

A. The chauffeur took them on the truck.

Q. That is right, and you paid for it?

A. Yes, sir.

Q. And you did not offer to return them?

A. No, sir.

Q. Did you make a complaint to the Office of Price Administration about this sale or other similar sales that you spoke about?

A. No, sir.

Q. Did you go up to the Office of Price Administration about this, or did an investigator come to your place of business?

A. An investigator came in the place of business.

Q. Approximately when?

A. As I recall, about the middle of December.

[fol. 75] Q. About the middle of December of 1943?

A. Yes. I am not sure about the date but it was quite some time after Thanksgiving.

Q. And do you recall the name of this investigator?

A. No, sir. He claimed he was a retired butcher. He used to work in New Jersey and he said he was doing me a favor. I said in what way. He said, Well, I want you to get things at ceiling prices. I said, I would like to get it, but I do not like to get anybody in trouble and I do not want to be involved in anything.

Q. Did he tell you that you were in trouble once before and that it might be a good idea for you not to get into trouble again?

A. No, sir.

Q. Now, you were in trouble once before, weren't you?

A. No, sir.

Q. Were you convicted of a violation on November 15, 1943, a War Emergency Act violation, for violating the OPA price of ceilings?

A. Well, I didn't violate any law. I did not know the law and I asked the Judge to consider I made no sale. He asked me if I wanted a jury trial and I said no. He said, Well, you will have to plead guilty or not plead guilty. Well, I did not have the means of hiring an attorney and a jury trial, so I pleaded guilty.

Q. You pleaded guilty to the offense charged?

A. Yes, sir, but I made no sale.

Q. And you were fined \$25?

A. Yes, sir.

Q. That was on November 15, 1943?



A. And I even told the Judge that I had no turkey for sale when the man came in the store.

Q. Well, give us the conversation in detail that you had with this unknown investigator from the OPA. What did he say to you and what did you say to him?

A. Well, he walked into the store, to Mr. Buell first, and [fol. 76] he asked Mr. Buell who does the buying, so Mr. Buell pointed at me. He asked me did I get turkeys. I said yes. He said "Where did you get them? I want to see the bill." I said "Who do you want to see? Do you want to see Cudahy?" He said no. I said "Do you want to see Bell & Evans?" He said no. I said, "Do you want Lodel?" He said no. He said "You have got turkeys off Kraus, didn't you?" I said yes. He said, "Well, I want to see that bill." So he told me if I wouldn't produce the bill he would send me a subpoena and I would waste a day down at the OPA, so I took the bill out and showed it to him. Then he asked me for the invoice of the turkeys. I gave him that in addition. He asked me what that \$22 was for, so I gave him that invoice, and then he started to write a statement out there.

Q. Did he ask to see anybody else's bills other than Kraus?

A. No, sir.

Q. Did he want to see the Cudahy bill?

A. What? No, sir.

Q. You spoke about the Cudahy bill. What was on Cudahy's bill?

A. That was just a box of turkeys on there. I did not know what he was getting at.

Q. All he wanted to see was the Kraus bill?

A. That is correct.

Q. And then he wrote out a statement?

A. Yes, sir.

Q. Did you tell him that you were compelled to take the chicken skins?

A. No, sir. There was nothing in that statement that I signed. I said that I accepted it, if I recall right, and he asked me why did I accept it. I said "Well, that's a condition. You come down to the market with me and you will see what goes on."

I do not think I wrote in there that I was compelled.  
[fol. 77] Q. Do you also buy meat from M. Kraus & Brothers, Inc.?

A. No, sir. My father only dealt with Mr. Kraus in the poultry line at 14th Street.

Q. And I believe you were asked whether you were familiar with the ceiling price on turkeys around the month of November 1943?

A. Yes, sir.

Q. And these turkeys were billed to you at ceiling prices?

A. Yes, sir.

Mr. Sahn: That is all.

Redirect examination.

By Mr. McAuley:

Q. During Christmas, Mr. Kuenzlen, did you buy turkeys or chickens at ceiling prices from Cudahy?

A. Yes, sir.

Q. Did they ever load chicken skins or gizzards on your truck?

A. No, sir.

Q. Did you ever tell them you wanted turkeys?

A. Yes, sir.

Q. Is that what you got?

A. Yes, sir.

Q. Did they ask you to buy anything else?

A. No, sir.

Q. Did they present you with any invoice for anything else?

A. No, sir.

Q. Did you also buy from Lobdell at this period?

A. Lodel.

Q. How is that?

A. Lodel, L-o-d-e-l.

Q. Did you buy turkeys at the ceiling price at that time?

A. Yes, sir.

Q. Was that the same price as indicated on the invoice, Government's Exhibit 4—the same price or prices as indicated on Government's Exhibit 4?

A. Yes, sir.

Q. Did you tell them that you wanted turkeys?

A. Yes, sir.

[fol. 78] Q. And is that what you got?

A. I generally order them two or three weeks ahead. We were customary in doing that.

Q. Did you get your turkeys?

A. Yes, sir.

Q. At ceiling prices?

A. Yes, sir.

Q. Were any chicken skins loaded on your truck by Lodel?

A. No, sir.

Q. Any gizzards?

A. No, sir.

Q. Any necks?

A. No, sir.

Q. Feet?

A. No, sir.

Q. You are sure?

A. Absolutely.

Q. Did you also buy from Bell & Evans at that time?

A. Yes, sir.

Q. Did you buy turkeys?

A. Yes, sir.

Q. At ceiling prices?

A. Yes, sir.

Q. The same prices indicated on Government's Exhibit 4?

A. Well, Bell & Evans charges us, I think, a cent more because it is transported from Camden, New Jersey. It about a cent difference than the price for store delivery.

Q. Is that railroad?

A. Yes, sir.

Q. Did they ever load any chicken skin on your truck?

A. No, sir.

The Court: They deliver to the stores.

Mr. McAuley: What is that?

The Court: He said they deliver to the stores.

The Witness: Yes.

Q. Did they ever deliver to your store any chicken skins?

A. No, sir.

Q. Any gizzards?

A. No, sir.

Q. Chicken feet?

A. No, sir.

Q. Necks?

A. No, sir.

[fol. 79] Q. Did you get just what you asked them for?

A. Yes, sir.

Mr. Kraus: That is all.

Recross-examination.

By Mr. Sahn:

Q. Do you buy anything else from Cudahy outside of turkeys?

A. Beef.

Q. You buy beef?

A. Yes, sir.

Q. When you buy beef from Cudahy do you get brains?

A. No, sir.

Q. Do you get liver?

A. No, sir.

Q. What?

A. No, sir.

Q. Did you get anything besides the beef?

A. No, sir.

Q. Just beef alone?

A. Yes, sir.

Q. You are sure of that?

A. I am positive.

Mr. Sahn: That is all.

Mr. McAuley: That is all.

MANUEL CUET, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. McAuley:

Q. Mr. Cuét, you are a butcher by trade?

A. Yes, sir.

Q. Where is your shop?

A. 535 Hudson Street.

Q. In Manhattan, New York?

A. Manhattan, New York.

[fol. 80] Q. How long have you been a butcher?

A. Oh, about over fifteen years.

Q. And how long have you been a butcher in that place, on Hudson Street?

A. I think about ten years or more.

Q. About ten years?

A. Yes.

Q. Can you give the Court and jury an idea of the size of your business? About how much business gross do you do every year; just roughly?

A. About fifty or sixty thousand dollars a year.

Q. About fifty or sixty thousand a year?

A. Yes.

Q. Have you been dealing for some time with M. Kraus & Brothers, Inc.?

A. Yes, sir.

Q. How many years have you been dealing with M. Kraus & Brothers, Inc.?

A. Well, I think about—I don't remember exactly, maybe about five years.

Q. Five years?

A. Yes.

Q. Were you buying turkeys from M. Kraus & Brothers, Inc., two or three years ago?

A. Yes.

Q. At that time when you bought turkeys did you get turkeys or did you get turkeys and something else?

A. Well, I put in my order there every year—every year I go to the sale-man and I say I need about so much turkey and he give it to me.

Q. Yes, but three years ago when you did that did you get turkeys?

A. Yes.

Q. Is that all you got three years ago?

A. Well, yes.

Mr. McAuley: Will you mark these for identification.

(Marked Government's Exhibits 6 and 7 for identification.)

Q. Now, I show you Government's Exhibit 6—

[fol. 81] (Mr. Sahn examines proposed exhibits.)

Mr. Sahn: No objection.

(Government's Exhibits 6 and 7 for identification received in evidence.)

Q. Mr. Cuet, I show you Government's Exhibits 6 and 7 in evidence. Will you look at those (handing).

A. The figures what you mean?

Q. Do you recall these papers? Did you see them before?

A. Yes, sir.

Q. They were given to you?

A. Yes, sir.

Q. By somebody in M. Kraus & Brothers, Inc.?

A. Yes, sir.

Q. Do you recall who gave them to you?

A. No, I couldn't remember.

Q. You don't remember just who gave them to you?

A. No.

Q. Do you remember the transaction?

A. On November 24th. Well, the transaction was that way. I was waiting outside and they handed to me to sign the bills, and they put the merchandise in the truck.

Q. Well, you do know you wanted to buy something. Did you go inside the place?

A. No, because I put in my order through ahead of time.

Q. Well, how did you do that, by telephone?

A. By telephone, yes.

Q. By telephone. You had phoned-in, is that right?

A. That is right.

Q. And you would talk to somebody in Krause's?

A. I used to call—the only friend I have there, a man named Jake.

Q. Jake?

A. I have been dealing with him for many years.

[fol. 82] Q. Does he work for Kraus—Jake, I mean?

A. That is right.

Q. You called Jake?

A. That is right.

Q. And what did you say to Jake?

A. Well, I said I needed some turkey and the answer was, "Well, whatever is coming, you get your share."

Q. You get your share of whatever is coming?

A. That is all.

Q. And then you went over there and waited outside on the street?

A. That is right.

Q. Did you have your truck there?

A. Yes, sir.

Q. Now do I understand that somebody came out and gave you these two pieces of paper?

A. That is right, yes, sir.

Q. Did you pay cash?

A. No, sir.

Q. Did you sign these?

A. Yes, sir.

Q. This is your signature here (indicating)?

A. Yes, sir.

Q. On Government's Exhibits 6 and 7?

A. Yes, sir.

Q. I notice you have a box of hen turkeys and a box of tom turkeys?

A. Yes.

Q. Were they loaded on your truck?

A. Yes, sir.

Q. Did you load them?

A. No; some colored fellow did that.

Q. He loaded them?

A. Yes, sir.

Q. And one box of feet?

A. Yes, sir.

Q. Were they put on your truck?

A. Well, I believe everything is all put together.

Q. And you took it home?

A. Yes, sir, I took it home.

Q. What did you pay this by—by check later?

A. Yes, sir.

Q. Did you pay this bill here?

A. In check.

Q. \$96.54.

A. Well, I pay the full amount because I pay by then every week, and I pay the full amount.

[fol. 83] Q. Is this your writing, "Cash, \$16.50"—

A. Yes.

Q. —is written under \$96.54?

A. Yes, sir.

Q. And did you add that up to \$113.04?

A. Yes.



Q. This is all your own handwriting?

A. Yes, sir.

Q. You put that figure on at your house?

A. Yes.

Q. And then you sent a check for \$113.04?

A. No, no.

Q. What did you do?

A. They sent me a statement for the full amount of whatever I buy. If I get backs of meat or I get backs of pork or chicken, I sent a check altogether in the full amount by the week.

Q. You mean you paid not only for these two items but for other items?

A. All together.

Q. I see, all together?

A. Yes, sir.

Q. And before this date, November 24th, had any barrels of chicken feet been put on your truck?

A. No, never before that.

Q. Not before?

A. No.

Q. Had you sold to your customers as a regular thing chicken feet?

A. Well, in the time of the war we been getting some stuff to help him out because I believe it is hard for everybody, not only chicken feet—we have been getting brains, we get—I am going to say—

The Court: Did you sell any chicken feet to anybody?

The Witness: Well, not this time. I did not sell no chicken feet, but—

Q. What did you do with these feet?

A. We helped them out to carry in the store something. We sometimes cannot sell it—

Q. But what did you do with these feet, this barrel of feet?

A. Well, I used some and the rest I throw away.

[fol. 84] Q. You say you used some of it? What did you use that for?

A. I sent it to the restaurant.

Q. You sent them or sold them?

A. Well, I tried to sell to them, to take some money out of the chicken feet.

Q. Well, did you sell any chicken feet?

A. I sold a very small amount.

Q. How much did you get for it?

A. Well, I remember I sold for the same price I bought it.

Q. You got 15 cents a pound?

A. That is right.

Q. For a couple of pounds?

A. That is right.

Q. But could you sell the whole barrel?

A. No, sir.

Q. Now what did you do with the balance of the barrel?

A. I give it to Van Iderstine & Company, the fat man.

Q. How many pounds would you say you sold of the 110?

A. Well, I couldn't be sure.

Q. Ten?

A. I think a little more, maybe. I couldn't remember. I couldn't tell you exactly what it was.

Q. And the balance you gave to the fat man?

A. That is right.

Q. Now since November 24th have you been going back to Kraus for chickens or turkeys?

A. Well, not turkeys because really my business is not in turkeys, but only Christmas and Thanksgiving Day.

Q. And Thanksgiving?

A. That's all.

Q. Well, did you go on Christmas—this was Thanksgiving, is that right?

A. Well, in Christmas they have no turkeys.

Q. So you did not get turkeys there?

A. And Christmas they have no turkeys.

Mr. McAuley: That is all.

[fol. 85] Cross-examination.

By Mr. Sahn:

Q. Mr. Cuet, nobody told you that you had to take these chicken feet, did they?

A. Nobody told me I had to take it or not.

Q. And you did not offer to return those chicken feet, did you?

A. No, sir.

Q. This man Jake you spoke about, whom you called up and talked to about the turkeys, he was the man who took

care of you on the meat that you bought at M. Kraus & Brothers, Inc., is that right?

A. That is right. Well, he is—generally before the war he sold me chicken, he sold me whatever he got because he was a good friend of mine.

Q. You bought a lot of meat from M. Kraus & Brothers, Inc.?

A. That is right, plenty.

Q. And you have always paid the ceiling price for that meat?

A. Yes, sir, that is true.

Q. And you paid the ceiling price for the turkeys?

A. Yes, sir.

Q. And nobody forced you to take them?

A. No, sir.

Mr. Sahn: That is all.

Redirect examination.

By Mr. McAuley:

Q. Did you ask for chicken feet?

A. Well, no.

Mr. McAuley: That is all.

[fol. 86] JULES KLEIN, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. McAuley:

Q. Mr. Klein, you are a butcher by trade?

A. That is correct.

Q. Where is your shop?

A. 1296 Third Avenue.

Q. That is in Yorkville?

A. In Yorkville, yes, sir.

Q. What kind of a shop is it?

A. General store.

Q. General butcher store?

A. Butcher and groceries and vegetables.

Q. Can you give us a general idea of the gross business you do a year—just a rough figure?

A. It is very hard for me to tell.

Q. About how much?

A. About \$65,000 worth of business.

Q. Mr. Klein, you sell turkeys once in a while to your trade?

A. Yes, sir.

Q. How long have you been dealing with M. Kraus & Brothers, Inc.?

A. Approximately thirty years, sir.

Q. Thirty years?

A. Yes, sir.

Q. At any time in your thirty years as a butcher have you ever had any demand by your trade for chicken feet, a small demand or medium sized demand?

A. Occasionally, yes, sir.

Q. Well, tell us about that. Where and when, about how big the demand was?

A. Well, people always ask for chicken feet and they ask for chicken gizzards. They ask for—we have a specialty, sometimes of what they call chicken gizzards, gizzards and giblets, different giblets, you know, consisting of feet and necks and gizzards, and chicken livers, of course—turkey livers.

[fol. 87] Q. A kind of chicken chop suey they make?

A. No, they make soup out of it.

By the Court:

Q. Does anybody ask for chicken feet by name?

A. Yes.

Q. Chicken feet?

A. Yes, sir—yes, your Honor.

Q. How often?

A. It don't happen very often but we have people accustomed to it that ask for chicken feet, because I was in the butcher business in Paris, France—

Q. Well, we are talking only about New York.

A. That is why I say people are accustomed to it.

Q. Are they French people?

A. Some—a lot of French people, yes.

By Mr. McAuley:

Q. Well, down through the last thirty years, Mr. Klein, how many pounds of chicken feet have you sold each year, on an average, down through the last thirty years?

A. That is very hard to say, of course, but we always used to save the chicken feet from our own chickens.

Q. From your own chickens?

A. I am only saying when we did not have any other supply.

Q. Well, how many times in the last thirty years have you run short so that you did not have enough feet from your own chickens and had to go out and buy a couple of barrels of feet all by themselves—how many times did that happen in the last thirty years?

A. It only happened once that I know of.

Q. When was that?

A. It was in reference to—what are you alluding to, counsel?

Q. I haven't alluded to anything, Mr. Klein.

A. You are alluding to the chicken sale by M. Kraus prior to Thanksgiving last?

[fol. 88] Q. I see. Do I understand then that you say that on one occasion in the last thirty years you ran out of chicken feet, meaning by that the feet which you had cut from a whole chicken, and you had a need to go out and buy a whole barrel of chicken feet?

A. I wouldn't say that, no.

Q. Well, what would you say? What are the facts?

A. The facts were that I got a barrel of chicken feet and—

Q. No, I am not talking about that. I will come to that later.

A. Yes, sir.

Q. I am asking you about your trade up there in Yorkville for the last thirty years. I am asking you to explain the chicken feet situation for the last thirty years before November, 1943.

A. Well, I had no occasion to run short prior to the mentioned date.

Q. You never ran short?

A. No.

Q. All right. Now I show you Government's Exhibits 8 and 9 Mr. Klein, marked for identification. You recognize that—

A. My signature.

Mr. Sahn: May I see them?

(Same handed to counsel.)

Mr. Sahn: No objection.

(Marked Government's Exhibits 8 and 9 in evidence.)

Q. Do you recall the transaction, Mr. Klein, of November 23, 1943?

A. I do.

Q. Which is indicated there?

A. Correct.

Q. Will you tell the Court and jury what you remember about that transaction?

A. I remember that I was told in the branch of 14th Street, of Mr. Kraus's establishment, that I should go down to the—where they received the turkeys by freight, and pick up two boxes of turkeys.

[fol. 89] Q. Was that the morning or the afternoon that you were told that?

A. The morning.

Q. And that was at another office of Kraus?

A. Yes.

Q. Where was that located?

A. 410 West 14th Street.

Q. And that is where you were in the morning?

A. Yes, sir.

Q. Do you remember to which man you spoke at that time?

A. That I couldn't tell you.

Q. Some man who was employed there?

A. Right.

Q. You had seen him before?

A. Yes, sir.

Q. And you had been doing business for thirty years, is that correct?

A. Right.

Q. Now, that afternoon did you go down to the other place you speak of?

A. That is right, I did.

Q. And where was that place?

A. That is 22 Tenth Avenue.

Q. And what happened down there?

A. I went and I asked the man in charge to—"I am here to pick up my turkeys."

Q. Who was the man in charge, do you remember?

A. The man in charge was Mr. Frankenstein, who gave me the ticket.

Q. Frankenstein?

A. Blankenstein.

Q. Blankenstein. And what did he say when you told him that?

A. Just handed me the tickets and signed and loaded up, that is all.

Q. Did you read the ticket?

A. I don't know if I did or not, to tell you the honest truth.

Q. Is this your signature on Government's Exhibit—

A. Correct.

Q. —8?

A. Yes, sir.

Q. And that is for two boxes of Tom turkeys?

A. Correct.

[fol. 90] Q. 205 pounds at 43 cents a pound for a total price of \$89.18?

A. Correct.

Q. On Government's Exhibit 9, is that your signature?

A. Correct, sir?

Q. For one box—for one barrel of feet, 100 pounds, at 15 cents a pound, or \$15, is that correct?

A. Correct.

Q. And did you pay for both of these items?

A. I did.

Q. Did you see the turkeys loaded on your truck?

A. Well, I was in the office and they took it outside.

Q. You did not watch the loading?

A. No, I did not.

Q. When you got up to Yorkville there, your truck was unloaded?

A. Yes, sir.

Q. What did you find?

A. I found two boxes and a barrel.

Q. Did you look in the boxes?

A. I knew it was marked—

Q. Well, did you look at them?

A. I did not open up the boxes.

Q. Well, eventually, did you look at them?

A. Yes, of course I did.

Q. And what did you see?

A. I found six turkeys in each box.

Q. And did you open the barrel?

A. Yes.



Q. And when you looked in what did you see?

A. I seen chicken feet.

Q. Chicken feet?

A. Yes, sir.

Q. A full barrel?

A. Well, not quite a full barrel.

Q. By any chance was your store at that time full of customers who wanted chicken feet?

A. I wouldn't say that, counsel.

Q. Well, what would you say?

A. In the course of our daily business we sold some chicken feet.

[fol. 91] Q. Will you name me five of your regular trade to whom you sold chicken feet in the month of November or December, 1943—five people. Name me five.

A. Mrs. DeFrior.

Q. Mrs. DeFrior?

A. Yes.

Q. Do you recall her address?

A. 210 East 73rd Street.

Q. How long has she dealt with you?

A. About two years.

Q. How many pounds of chicken feet do you say she bought from you in the months of November and December? That would be a five-week period—the last week of November and the whole of December. Would chicken feet keep fresh for five weeks, by the way?

A. No, sir.

Q. Well, when would chicken feet become unfit for human consumption?

A. After a week or so.

Q. A week. All right. Then we will narrow the question, in the course of a week how many pounds of chicken feet did Mrs. DeFrior buy?

A. Well, she only bought a couple of pounds.

Q. How many?

A. Five pounds altogether.

Q. Five?

A. Yes.

Q. All right, that is five pounds. Now which other customers?

The Court: Did you get her address?

Mr. McAuley: Yes, 210 East 73rd Street.

A. I just can't remember names, because she happened to be a French woman, that is how I remembered the name.

Q. Did you have any Irish customers?

[fol. 92] The Court: Is that a lot sold, five pounds?

The Witness: Well, not at one time.

The Court: It isn't?

The Witness: No. Maybe two pounds or so.

Q. She came in twice that week for chicken feet?

A. That is right.

Q. Bought two pounds on one occasion and three pounds the next?

A. That is correct.

Q. Have you any German customers?

A. I have a few.

Q. Any of the German customers during that week buy chicken feet?

A. Yes, one particular one I can tell you.

Q. What is the name?

A. I don't know her address but I know her name. Goetz is her name.

Q. G-e-t-z?

A. G-o-e-t-z.

Q. Goetz?

A. Yes.

Q. And you do not recall her address?

A. I do not. She comes in the store every—

Q. Well, how many pounds did she buy in that week?

A. Five pounds.

Q. Can you recall the name of any other customer who bought chicken feet that week?

A. I gave some away. I gave away some to charity and I gave—

Q. No, I am not talking about that. We will come to that later. Any other customers?

A. I just can't remember any other customers.

Q. Mrs. Goetz. Do you know her husband's business or occupation?

A. I really do not, to tell you the truth. She lives in the Bronx and she comes twice a week to do her marketing.

Q. And for how many years has she been buying five pounds of chicken feet every time she comes?

A. Well, I wouldn't say five pounds; two pounds.

[fol. 93] Q. Two pounds. How many years has she been doing that?

A. Naturally, I am very liberal. I gave a little more than she paid.

Q. Naturally, but how many years has she been buying chicken feet every time she comes down to Yorkville from the Bronx?

A. Three years.

Q. Now that would be about 15 pounds of chicken feet.

A. Yes.

Q. Do you remember what you did with the 85 pounds that were left?

A. I gave some to restaurants, you understand.

Q. Did you give them or sell them?

A. I gave them.

Q. Free, is that right?

A. Yes.

Q. And did you give them to anybody else except restaurants?

A. Yes; to a lot of people I gave chicken feet. I have always, in the compartment where I put the chicken feet, away from the rest of the cuts, the chicken cuts, and therefore I always give them—

Q. Well, you do not carry chicken feet as a good will item, do you, and give them away as souvenirs?

A. No.

Q. That isn't what you mean. You do not mean that, do you?

A. I give them away, yes.

Q. I know you give them away, but down through the years—

Mr. McAuley: That is all.

Cross-examination.

By Mr. Sahn:

Q. You have been in the butcher business for thirty years?

A. Yes, sir.

Q. And I take it you are somewhat familiar with the various types of poultry that have been sold over the past thirty years, is that right?

A. Yes, sir.

[fol. 94] Q. Now as a matter of fact hasn't the practice, which is called in the trade, eviscerating poultry or cut parts poultry, grown up only in the past twelve to fifteen months?

A. That is correct.

Q. And there are stores in your territory which sell nothing but cut parts?

A. That is correct.

Q. They sell gizzards?

A. Yes, sir.

Q. They sell skin and back and neck?

A. Yes, sir.

Q. And they sell feet?

A. Yes, sir.

Q. And they sell breast?

A. That is right.

Q. And they sell wings?

A. That is correct.

Q. Now to your knowledge that is a practice that has recently come into being in the poultry business, and that practice did not exist thirty years ago, did it?

A. No, sir.

Q. It did not exist twenty years ago?

A. No, sir.

Q. It did not exist five years ago, did it?

A. No, sir.

Q. It is something that recently came into being, so that when you were asked how many pounds of chicken feet you handled thirty years ago, nobody handled chicken feet thirty years ago, is that correct?

A. Right.

Mr. McAuley: He said he did. He cut them off the chicken.

Q. And nobody handled breasts thirty years ago?

A. I am not, for chicken feet in those days—

Q. Thirty years ago—

The Court: Didn't you say that you have been selling chicken feet your whole life, beginning in Paris thirty years ago?

The Witness: That is right, in Paris I did, but in practice up here, not for money. I always put it aside and give it away to my trade.

[fol. 95] The Court: Didn't you say persons came in occasionally and bought them?

The Witness: Well, only over the last few years. Since the beginning of the war, maybe.

Q. Thirty years ago you may have cut up your own poultry for the convenience of your customers?

A. I do today yet.

Q. Did anybody talk to you about these chicken feet?

A. No, sir.

Q. Did anybody demand that you take them?

A. No, sir.

Q. Did anybody compel you take them?

A. No, sir.

Q. Did anybody require that you take them?

A. No.

Q. Did you offer to return them?

A. Beg pardon?

Q. Did you offer to return them?

A. No, sir.

Q. You did not make a complaint to the Office of Price Administration, did you?

A. I did not.

Q. An investigator came down to your place?

A. That is correct.

Q. And he told you that you had already been in trouble and that in order to stay out of more trouble he wanted an affidavit from you, didn't he?

A. He didn't say that. He said that—he asked me to show him the ticket for turkeys, and I showed him the ticket for turkeys, so he said “Where did you buy the turkeys?” and I told him. He said, “Let me see the ticket. I know all about it, that you bought them by Max Kraus,” he says, “and let me see the ticket.” I showed him the ticket that's all, and that is the way the exhibit is.

Q. And didn't he tell you that you had been in trouble before and he wanted you to stay out of trouble?

A. No.

Q. You had been trouble before?

A. No, sir.

[fol. 96] Q. Weren't you convicted under the War Emergency Act for violation of an Office of Price Administration ceiling?

A. When was that?

Q. Were you convicted in the month of October 1943, after a plea of guilty?

A. I did, yes.

Q. You think so? You can't remember; you think so?

A. I do.

Q. You do remember?

A. Yes, I remember, that's right.

Q. Now weren't you convicted again after that?

A. What was the question?

Q. Weren't you convicted again after that?

A. No, sir.

Q. Before October 1943 were you convicted?

A. No, sir.

Q. Well, what happened to you when you were convicted in October?

A. I paid a fine of \$25.

Q. You paid a fine of \$25?

A. Yes.

Q. You pleaded guilty?

A. That is right?

Redirect examination.

By Mr. McAuley:

Q. Is it a fair statement to make, Mr. Klein, that chicken breasts and chicken legs move faster in the chicken parts business than chicken feet?

A. No.

Q. Is it easier to sell breasts or legs?

A. Oh, yes, definitely.

Q. You did not get any chicken breasts or legs here, did you?

A. No, sir.

Q. As a matter of fact, you are not in the chicken parts business, are you?

A. No, sir.

Q. You never have been, have you?

A. No.

Q. You don't find it pleasant to testify in this case do you, Mr. Klein?

A. I swore that I would tell the truth and I am going to stick to it, that's all.

[fol. 97] Mr. McAuley: That is all.

Recross-examination.

By Mr. Sahn:

Q. You bought a lot of meat from M. Kraus & Brothers, Inc., didn't you?

A. I sure did.

Q. Are you familiar with the ceiling price on cuts of beef and veal and lamb?

A. Yes.

Q. Have you ever paid over the ceiling price to M. Kraus & Brothers, Inc.?

A. No, sir.

Mr. Sahn: That is all.

By Mr. McAuley:

Q. But you did get chicken feet on this occasion?

A. That is true.

Mr. McAuley: That is all.

MAX BRAVERMAN, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. McAuley:

Q. Mr. Braverman, you are a butcher by trade?

A. Yes.

Q. And where is your place of business?

A. 90 Stanton Street.

Q. Where is that, New York City?

A. New York City.

Q. In the Borough of Manhattan?

A. Yes.

Q. And how long have you been a butcher?

A. About 18 years.

[fol. 98] Q. About eight?

A. Eighteen years.

Q. Do you run a kosher butcher shop?

A. No.



Q. How many years have you been dealing with M. Kraus & Brothers, Inc.?

A. About twelve years.

Q. Twelve years.

A. Yes.

Q. And will you tell the Court and jury about the size of your business, the gross volume a year?

A. Gross volume a year? About \$60,000.

Q. About \$60,000 a year?

A. Yes.

Q. It is a neighborhood store, is that right?

A. Yes, sir.

Q. Have you been in the habit of buying turkeys and chickens from Kraus?

A. Yes, sir.

Mr. Sahn: That is objected to, as to the form, what he has been in the habit of doing.

The Court: I will allow it.

Q. Around the holiday season?

A. Yes.

Q. Or throughout the year?

A. No, just for the holiday season.

Q. Just for the holiday season?

A. Yes.

(Mr. McAuley hands proposed exhibits to Mr. Sahn.)

Mr. Sahn: No objection to these.

(Government's Exhibits 10, 11 and 12 marked in evidence.)

Q. Do you recall, Mr. Braverman, going to M. Kraus & Brothers, Inc., on November 24, 1943?

A. Yes.

Q. To buy some turkeys?

A. Yes.

Q. Will you tell us what you recall about where you went, who you saw and who you talked to?

[fol. 99] A. I went to the market—I think it was a Wednesday—I am not sure—a Wednesday, and I got two boxes of turkeys.

Q. Well, don't tell us what you got. You went there, and what did you say?

A. I didn't say nothing because it was all marked up already.

Q. What is that?

A. It was all marked up.

Q. Well, had you made a phone call before you went there?

A. I did talk by Kraus the day before.

Q. Were you talking to Mr. Kraus himself?

A. No.

Q. Whom did you talk to?

A. I was talking to a man who works at Mr. Kraus.

Q. What is his name?

A. I think his name is Jack.

Q. What is that?

A. Jack.

Q. Jack? What is his last name?

A. I couldn't tell you.

Q. And that was the day before?

A. Yes, sir.

Q. And you talked to him personally?

A. Yes.

Q. What did you say to him that day?

A. I told him he should try, because I used to buy the poultry from him, I begged him he should try to save me a few boxes of turkeys tomorrow, because he would have them in his place there Tuesday.

Q. And what did he say to you?

A. He said he is going to try.

Q. Now, you went back the next day, is that right?

A. Yes.

Q. Tell us what happened?

A. I come over, I was waiting about two hours because the turkeys just come in.

Q. Yes.

A. When they come in there was a lot of butchers there and everybody made for his next, and when my next came—

Q. Did they call your name out?

A. Yes, sure.

Q. Who called your name out?

A. I think Charlie.

[fol. 100] Q. Charlie? Who is he, do you know his last name?

A. No, I don't.

Q. And when Charlie called your name out, what happened?

A. He give me the two boxes of turkeys and I took the stuff and I went home. The lugger took the stuff out and I went home.

Q. Did he give you anything else?

A. Yes.

Q. What else did he give you?

A. I just don't remember. I think I got some stuff to it; I think I got chicken feet.

Q. You think you got chicken feet?

A. I don't remember—gizzards or chicken feet; I don't remember, to tell you the truth.

Q. Well, will you look at these bills, Government's Exhibits 10, 11 and 12. Did you sign those (handing)?

A. I paid cash. You see, I don't sign. I paid for it.

Q. You paid cash?

A. Yes.

Q. Were those three bills given to you at the same time?

A. Yes, sure—no, I don't think so.

Q. You were there only once that day?

A. Yes—no, I think I took the chicken in a different place. He has two places.

Q. I see.

A. I got the turkeys I think in a different place than the chickens I got in the morning in 14th Street.

Q. There appear to be three different transactions.

A. Yes.

Q. Did you come and leave the place three times that day?

A. Yes, sure. I went in the morning, I took the chickens in the morning.

Q. In and out?

A. I took the chickens and went home, and about three o'clock I come back and got the turkeys?

Q. That would be two. Now where is the other bill?

A. I got two bills on chickens, I think.

[fol. 101] Q. You got two?

A. Yes.

Q. One in the morning and one in the afternoon?

A. No, the same time in the morning. I got the chickens—I don't remember.

Q. Look at the bill and see if that refreshes your recollection.

A. Yes. This I got in the morning, about seven o'clock in the morning.

Q. Which one is that?

A. All the three bills of chickens. It was a holiday that time.

Q. You got all these in the morning?

A. Yes.

Q. And that was early, seven o'clock?

A. About seven or eight o'clock.

Q. And do you recall who gave you these bills?

A. These I took in 14th Street. The bookkeeper gave it to me.

Q. What was his name?

A. I think Oscar.

Q. Oscar?

A. I just don't remember for sure. The bookkeeper gave it to me—the fellow who works there, his name is Oscar.

Q. Well, you have been going there for twelve years?

A. Yes.

Q. You don't know who the bookkeeper is?

A. I pay cash for it. I don't remember whether I paid Oscar or somebody else, because sometimes he goes out for dinner.

Q. Well, did you pay the same fellow that you had been paying for twelve years?

A. Yes, sure.

Q. Do you know his name?

A. Oscar—Oscar is the name.

Q. Do you know his last name?

A. No.

Q. And he gave you these three, is that right?

A. Yes.

Q. Did you read the bills when you got them?

A. Yes, sure.

Q. Did you read chicken feet on them, on this one?

A. Yes.

[fol. 102] Q. Chicken feet here?

A. Yes.

Q. And chicken feet?

A. Yes.

Q. And did you buy chicken feet?

A. I paid for chicken feet.

Q. I know you paid for them, but did you buy them?

A. No.

Q. Did you want to buy chicken feet.

A. I paid for them.

Q. I am not asking you that. I asked you, did you want to buy chicken feet?

A. When I come in I go over to the bookkeeper—

Q. Wait. When you left your place in Stanton Street the day before to come down to Kraus Brothers, did you come down to buy chicken feet?

A. I went to buy chickens.

Q. You went to buy chickens, is that right?

A. Yes.

Q. Did you go to buy chicken feet?

A. When I am going out from the house, I do not make up my mind what to buy. It is what I can get.

Q. You never know what you are going to get?

A. Nowadays in the meat business, not like last year, because you could sell everything you could get. Meat was scarce last year. People bought everything they could get.

Q. And you took this home, did you?

A. Yes, sir.

Q. 104 pounds of chickens?

A. Yes.

Q. And five pounds of chicken feet at 20 cents a pound?

A. Yes.

Q. Is that right?

A. Yes, sir.

Q. And here you took 106 pounds of chickens and 5 pounds of chicken feet?

A. Everyone is a barrel.

Q. A barrel?

A. A barrel of chicken, yes, 104 or 106.

Q. So you got three barrels of chickens?

A. Yes.

Q. And they were at—

A. Five pounds at 20 cents is one dollar.

[fol. 103] Q. Each one of these have one dollar's worth of chicken feet on them?

A. Yes.

Q. So you got 15 pounds in all?

A. Yes.

Q. And you paid 20 cents a pound for this chicken feet?

A. Yes, sir.

Q. Were you tickled to death to get them?

Mr. Sahn: That is objected to, your Honor.

Mr. McAuley: Have we had a ruling?

The Court: Do you want one?

Q. What did you do with the chicken feet?

A. I sold them. I am on the East Side, you see—I am on Orchard Street section, and other there there is no question what you are getting, you sell, because there is laborers—there is a lot of people working over there. Over there is a very poor neighborhood and over there you can sell it.

Q. Well, during a full week—let us go back to 1942.

A. Yes.

Q. During a full week in 1942 how many pounds of chicken feet would you sell?

A. You couldn't get it in 1942.

Q. What do you mean, you couldn't get it?

A. Because you couldn't buy no chicken feet separate.

Q. Oh, I see. You can cut them off your own chickens?

A. Oh, yes, sure, we sell them with the chickens.

Q. The customer takes the legs?

A. Yes.

Q. They do like you now do—

A. No, they take it with them.

Q. Did you ever buy chicken feet, loose, in 1942, to satisfy your own customers?

A. In 1942 they did not buy chickens? At that time they used to buy the poultry all. When the war start they just—[fol. 104] when the market open up the chickens—they selling every part separate. They sell the whole thing separate—the feet separate, the gizzards separate, the neck separate. It was a new business when the war start.

Q. Chiefly breasts and not feet—breasts and legs?

A. Whole chickens, not pieces.

Q. I am asking you in 1942 did you ever buy three barrels of chicken feet from Kraus?

A. In 1942 you couldn't sell them because he did not have them.

Q. How do you know?

A. Because I know it.

Q. Did he tell you that?

A. I don't know. I didn't ask him.

Q. Well, how do you know?

A. He did not have.

Q. You do not know, do you?

A. You couldn't get it nowhere.

Q. Well, do you know—did you ask him for chicken feet in 1942?

A. No.

Q. Is that right?

A. That is right.

Q. You did not ask him?

A. No.

Q. Now, Mr. Braverman, did you ever on any prior occasion tell the investigator from the Office of Price Administration, or did you tell me on April 19th that your dealings were personally with Mr. Max Kraus?

A. No, with Max Kraus concern maybe I mean.

Q. No, with Mr. Max Kraus—did you ever tell anybody that?

A. No, because I don't know even Max Kraus personally; I never talked with him yet.

Q. Did you ever tell Mr. Schubert of the OPA about Oscar?

A. I don't remember.

Q. Now can you recall whether you ever told Investigator Schubert about Oscar?

A. No, I don't remember.

Q. Did you ever tell me about Oscar?

A. I don't think so.

[fol. 105] Q. It is correct that I talked to you for about an hour about this matter?

A. Yes.

Q. On April 19th, is that right?

A. Yes.

Q. Did you ever tell me about Oscar?

A. I don't know if you asked me that question—about paying the bill. I don't remember or not, if you asked me about paying the bill I would tell you Oscar.

Q. Can you remember anything I did not ask you about this transaction?

A. I don't remember.

Q. Well, do you think you told me about Oscar?

A. I don't remember. If you asked me that question about paying I would tell you I paid Oscar, because he is the bookkeeper, and if Oscar is not there, he goes out for dinner and somebody else gets the money there.

Q. What is the name of the man you say you spoke to the day before?

A. Jack.

Q. Did you ever tell me about Jack when I talked to you about an hour?



A. If you would ask me I would tell you. Maybe you did not ask me. I bought it from M. Kraus & Company, from that concern, but I did not buy from Max Kraus because I don't know him.

Q. I ask you—

Mr. McAuley: Will you mark this for identification, please.

(Marked Government's Exhibit 13 for identification.)

Q. I show you Government's Exhibit 13 for identification and ask you to read each and every word of that and see if it refreshes your recollection about the transactions you have testified to (handing)?

A. I will have to have somebody read it for me because I couldn't read it all. You see, I would like somebody to come [fol. 106] over and read it for me because I can't read it. I could read over a few words.

Q. Well, will you read the words that you can read and just put a pencil under the words that you can't read and then we will see what we can do about that. Just read the words you can read and underline the words you can't read.

A. I can't make it out. If you could print it out—but I can't read this. This writing is too good for me.

Q. The writing is too good?

A. I mean I could read it better if it is printed.

Mr. McAuley: Would your Honor like to examine that (handing to the Court). It seems quite legible.

Mr. Sahn: Has that been offered?

Mr. McAuley: No, I am leaving it for the moment.

Q. Now, do you recall being in my office, Mr. Braverman, on April 19th?

A. Yes.

Q. And do you recall my asking you questions?

A. Yes.

Q. And you gave me answers?

A. Yes, sir.

Q. And did you tell me the truth on that occasion?

A. Yes.

Q. Now, I have some printing here. Would you look at this piece of paper (handing).

A. This I can read.

Q. You can read this?

A. Yes.

Q. Will you read from where it says "Q"—q-u-e-s-t-i-o-n here—all the way down to the bottom, and tell me if that refreshes your recollection (indicating)—as to what happened on the day you bought these chickens.

A. (After reading) I read it all.

[fol. 107] Q. Can you read the words there?

A. Yes.

Mr. Sahn: I ask now that that testimony be shown to me before the witness testifies as to it. Under the decision of the Supreme Court in *United States v. Socony Vacuum Oil Company*, where it was held that where grand jury minutes are used to refresh a witness's recollection—

Mr. McAuley: These are not grand jury minutes.

Mr. Sahn: —it is discretionary with the Judge whether or not such minutes might be used to refresh his recollection, and I am not questioning your Honor's discretion here in allowing this witness's recollection to be refreshed; but the court also held that under such circumstances opposing counsel is entitled to see a copy of the minutes.

The Court: I haven't been exercising any discretion. I would hold that the United States had an absolute legal right to insist on doing precisely what it has done. I will deny your application, which I understand is for permission to read what the witness has read.

Mr. Sahn: My application is to read then the original affidavit allegedly signed by that witness on which those questions and answers are based.

The Court: I do not even know that there was an affidavit signed by him. I deny your application no matter how you phrase it, if it is to read the matter that has just been presented to the witness.

Mr. Sahn: Exception.

Q. Mr. Braverman, have you read each and every one of the words there?

A. Yes.

[fol. 108] Q. Now does reading those words refresh your mind about what actually happened on the day you bought the chickens?

A. Yes.

Q. It does clear up your mind?

A. Yes, sure.

Q. Now does reading those words refresh your mind after reading that paper—put it down now—will you tell us to whom you did speak these few words on that day when you bought the chickens?

A. I did not speak to anybody that day.

Q. Did you read these questions and answers?

A. Yes. Every one that is marked here I said—everything that is marked over here I said.

Q. That is what you told me?

A. Yes, that was my explanation.

Q. Is that right?

A. Yes.

Q. Is that true?

A. Yes.

Q. You are sure you understand the words?

A. Yes, every word. This I can read.

Q. And that is correct?

A. Yes.

Q. Now will you stand up—do you know Mr. Kraus, the defendant?

A. Yes, sure.

(Defendant Kraus stands.)

A. That is the man (indicating).

Q. That is right.

A. We have two Krauses—over there in the back you mean?

Q. No, with the blue suit.

A. Yes, he is from the Kraus store. I think he is the older Kraus.

Q. Did he speak to you on that day?

A. No.

Q. Is there another Kraus?

A. Yes—over there in the back (indicating).

[fol. 109] Mr. McAuley: Is there another Mr. Kraus in the room? Will you please stand up.

(A man stands in the rear of the courtroom.)

Q. Did that Kraus speak to you—did he speak to you on that day?

A. No, they didn't talk to me, not the Krauses.

Q. Now, Mr. Braverman, on the 19th of April, 1944, did I ask you if there was a ceiling price on chickens?

A. Yes.

Q. Did you answer: "Yeh, sure."?

A. Yes.

Q. Just listen carefully. Did I ask you: "Q. Were you willing to buy at the ceiling price?"

A. Yes.

Q. Did I ask you that—

Mr. Sahn: If your Honor please, I object to that method of getting those questions and answers into the record.

The Court: Overruled.

Mr. Sahn: Exception.

Q. Did I ask you: "Were you willing to buy at the ceiling price?"

A. Yes.

Q. And did you answer: "Yeh, sure." Is that correct?

A. Yes.

Q. And did I ask you: "What conversations did you have with Kraus?" Did I ask you that?

A. I don't remember that.

Q. Well, do you recall if I asked you "What conversations did you have with Kraus?"

A. With Kraus people, not with Kraus alone, because I never talked to the man.

[fol. 110] Q. Now does the word Kraus—does that mean Kraus people to you?

A. It means they have a lot of people working there, they have about fifteen or twenty men, maybe thirty men working there. It is like Swift & Company—I never talked to Swift.

Q. Did you answer: "No conversations at all; just went over and he give me poultry because you can't get all you want; he gives you so much and so much." Did you answer that?

A. Yes.

Q. Were you asked the question: "He gives you a certain amount of poultry?" and did you answer: "Yeh."

A. Yes.

Q. And were you asked the question: "What happened then?" and did you answer—

A. Yes, sure.

Q. —"Nothing; I took the poultry and I went home."

A. That is right.

Q. Is that correct?

A. Yes.

Q. Were you asked the question: "Did you ask for chicken feet?"—did I ask you that?

A. If I asked for chicken feet?

Q. "Q. Did you ask for chicken feet?"

A. The day that I got the poultry—

Q. No; did I ask you that question in my office?

A. Yes.

Q. And did you answer: "No."

A. I said—I answered no?

Q. Did you answer "No" when I asked you the question: "Did you ask for chicken feet?" And did you answer "No."

A. I didn't ask him for chicken feet because—

Q. Did I ask you—

A. Yes.

Q. If you asked Kraus for chicken feet—did I ask you that question?

A. I don't remember.

[fol. 111] Q. Do you recall if you answered "No"?

A. I don't remember that.

Q. Did I ask you "Would you have preferred not to buy them?"—did I ask you that?

A. I don't remember.

Q. And did you answer: "No, no."

A. If I went in and asked for chicken feet?

Q. No; whether I asked you.

A. I don't remember that.

Q. Did I ask you that question in my office?

A. I don't remember.

Q. Did I ask you if "You wanted them?" and did you answer "Yeh."

A. I don't remember that.

The Court: I think that is enough.

Mr. McAuley: All right, your Honor.

Q. Just one more question—

The Court: Do you write your bills out in Yiddish or Jewish?

The Witness: No.

The Court: Do you write them in English?

The Witness: Yes.

The Court: Are you able to read English well?

The Witness: Well, not sure. I can read or write what is printed, I can read an English paper.

The Court: You read an English paper?

The Witness: Yes.

Mr. McAuley: Your Honor, I would like to ask, if I may, one further question.

Q. Will you look at each and every one of these pages,—

A. From the start?

[fol. 112] Q. Yes—and see if it refreshes your recollection as to whether you ever told me about Jack or Oscar?

The Court: Well, you can answer that without reading it.

Q. Did you ever tell me about Jack or Oscar before you took the stand today?

A. If you did not ask me—

The Court: Did you ever?

The Witness: No.

Q. I asked you a lot of questions, didn't I, about where you went, who you paid money to?

A. Yes.

Q. Who gave you the chickens—did I ask you all that?

A. Yes.

Q. And did you ever tell me about Jack or Oscar?

A. No.

Q. I will ask you one further question: has anybody advised you, Mr. Braverman, that if you were called to testify in this court at any time, you could tell all about the chickens and the chicken feet but to leave out the name of Max Kraus?

A. I did not get that.

Q. Because in that way the corporation might be found guilty but not Max Kraus—has anybody asked you that and told you to give the name of Jack and Oscar here when you came to court?

A. No.

Q. Nobody told you that?

A. No.

Mr. McAuley: That is all.

Cross-examination.

By Mr. Sahn:

Q. Did you ever see me—

[fol. 113] The Court: I understand the United States attorney has an engagement for four o'clock, so I will suspend now until half past ten tomorrow morning.

Mr. McAuley: Will you attend tomorrow morning, Mr. Braverman, for a few minutes tomorrow?

The Witness: O. K.

(Adjourned until May 24, 1944, at 10:30 A. M.)

New York, May 24, 1944;  
10:30 A. M.

### Trial Resumed

MAX BRAVERMAN, resumed the stand.

The Court: Let me see that yellow paper with this witness's name on it.

(Paper handed to the Court by Mr. McAuley.)

The Court: (After examining) All right.

Mr. Sahn: No cross-examination.

By Mr. McAuley:

Q. Mr. Braverman, I show you Government's Exhibit 13 for identification. Is that your signature (handing witness)?

A. Yes.

Q. You signed that?

A. Yes.

Q. When did you sign it?

A. I don't know when I signed it but that is my signature. That is my signature.

Q. Do you recall the circumstances under which you signed that paper?

A. It was not in your office, was it? I did not sign it there. [fol. 114] Q. Do you see Mr. Schubert sitting over here (indicating), the investigator from the OPA?



A. Yes.

Q. Do you remember him coming to your B. & B. shop and talk to you and your brother?

A. Yes.

Q. Does that refresh your recollection as to when you signed that?

A. Yes.

Q. Is that when you tendered it?

A. Yes.

Q. How long were they there with you?

A. About one hour.

Q. One hour?

A. I think so, maybe less.

Q. Talk a while?

A. Yes.

Q. Asked you questions?

A. Yes.

Mr. McAuley: That is all.

By the Court:

Q. Do you know a man named Nathan?

A. Yes.

Q. Did you do any business with him on the 23rd of November?

A. Yes.

Q. You haven't mentioned his name yet, have you?

A. No.

Q. You were talking about Oscar?

A. Yes.

Q. Is Oscar the same man as Nathan?

A. No.

Q. A different man?

A. Yes.

Q. What business did you do with Nathan?

A. To Nathan I was talking the day before that sale.

Q. On the telephone or there?

A. On the telephone.

Q. What was the conversation?

A. I called him up the day before, he should try to save me some poultry.

Q. Did you say yesterday that you had a talk with Nathan?

A. No.

Q. You said you talked with somebody else, did you?

A. Oscar. I paid the bill. He is the cashier.

[fol. 115] Q. On the telephone, you had that conversation—

A. But this is two houses. It is two different houses. I am on 14th Street. Jack is on—what is that, 13th Street,—No, not 13th Street—Tenth Avenue. It is two different places.

Q. Did you talk to Nathan about chickens?

A. Yes.

Q. When, the day before?

A. The day before.

Q. What did you say to him?

A. I told him if he get me some poultry he should try to save me some for the holiday.

Q. What did he say?

A. He would try.

Q. Well, why did you go to the other store?

A. Well, in the other store they had turkeys. You see, they have two places. It is about three or four blocks away.

Q. Now, you say you read English papers?

A. Yes.

Q. You can read your own signature on that paper, can't you?

A. Yes.

Q. But you can't read writing?

A. Writing, no; printing.

Q. You can't read the writing on that paper?

A. Well, I can read it a little bit.

The Court: Well, show it to him. He says he can read it a little bit.

(Paper handed to the witness by Mr. McAuley.)

Q. Sit there and read it all as well as you can.

A. (After reading) This I couldn't read at all, I couldn't understand it.

Q. Try it. Take your time. You have all day.

A. This writing is too—(examining).

No, I can't make it out.

Q. Try again.

A. There are certain words I can't read at all.

[fol. 116] Q. Take your time.

A. (Examining) Certain words I can read it over, but I couldn't understand.

Q. What words can't you read?

A. I can't make out what that means (indicating).

Q. What else?

A. This (indicating).

Q. You can read it all right. Just omit that word that you can't read. Don't read it out loud but keep on reading.

A. (Examining) I can't make it out.

Q. What can't you make out?

A. A lot of words I cannot understand it.

Q. What can't you make out, beginning after the word you pointed out—what is the next one you can't understand—this (indicating)?

A. What does that mean?

Q. Can't you read that? Can't you read those words?

A. No.

Q. Why?

A. Because it is not—

Q. Spell them—what letter is that?

A. J.

Q. What is the next?

A. A e e s—I don't know what is it. I don't know. It is an s or a e—the writing is not clear.

Q. What is after the e?

A. S-e—it is e e l.

Q. What is the next word?

A. M a g e—I can't read it.

Q. You can read it all right. Keep on reading it until you read the whole thing.

A. (Examining further) I understand a little bit, that is all. All of it I can't understand.

Q. All right, keep on trying until you understand.

A. (After examining) I understand it a little better, now.

The Court: All right. You examine him, now. He says he understands it better, now. Do you want to ask him any questions?

Mr. McAuley: Yes.

[fol. 117] By Mr. McAuley:

Q. You understand that?

A. Yes, a little bit I could make it out.

Q. Was Max Kraus there when you bought those chickens?

A. I did not see him.

Q. Did he say anything to you?

A. No.

Q. He did not talk to you?

A. No.

Q. You are sure of that?

A. Positive.

Q. Did you say you can understand that?

A. Yes.

Q. Are you sure of that?

A. Yes.

Mr. McAuley: Will your Honor inspect that? I would like to show that to the witness once again this morning (handing paper to the Court).

The Court: Between the horizontal lines?

Mr. McAuley: Yes, between the horizontal lines.

The Court: (After examining) Well, what about it?

Mr. McAuley: I would like to read that and see if that refreshes his recollection. He did not read that yesterday.

The Court: I think that is enough.

Mr. McAuley: You think it is enough? All right.

That is all, Mr. Braverman.

Mr. Salem: No cross.

(Witness excused.)

Mr. McAuley: Mr. Schubert.

[fol. 118] EDWARD S. SCHUBERT, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. McAuley:

Q. Mr. Schubert, you are an investigator for the OPA?

A. Yes, sir.

Q. On the 3rd day of December did you go to the butcher shop of the preceding witness, Max Braverman?

A. I did.

Q. Will you tell the Court and jury just what happened there, who was present and what happened?

A. When I first came in Mr. Braverman's brother or a man who identified himself as Mr. Braverman's brother

was there, Mr. Nagelberg, another investigator who was with me, and I spoke to Mr. Braverman's brother and discussed purchases with him until Mr. Max Braverman finally came in. By that time we had received several bills from Mr. Max Braverman's brother, Samuel Braverman.

Q. Had you requested any particular bills?

A. We asked for all the bills, all the recent bill, and from all of them had chosen several to discuss with Max Braverman. We spoke to Max about the particular bills, several bills of M. Kraus. We asked him whether those were his bills—whether those were his purchases and whether he had received all the items on the bills. He said he had. We asked him specifically about the chicken feet which was on the bills. At first he said he did not receive them. Then he admitted that he had received them. We asked him what he used them for, whom he sold them to, and whether he ordered them. He said he hadn't—he said he never wanted them. He said he just had to take them. I can't quite [fol. 119] recall, Mr. McAuley, without reference to the affidavit because when we got this information I started to write out a statement. Mr. Nagelberg or I would ask a question and I would record Max Braverman's answer on that piece of paper. We would ask another question and I would record the answer. When we finally—when I finally finished writing completely I had the answers to all the questions or most of them that I asked or that Mr. Nagelberg had asked Mr. Braverman, and I asked Mr. Braverman to read it. He and his brother were standing together at that time and all during the interview. He said, "Maybe you had better read it." So Mr. Nagelberg and I, Samuel Braverman and Max Braverman, walked over to a cashier's cage in the store and one of the Bravermans called the worker from behind the counter. The two brothers and the worker stood by as I read very slowly and followed the words as I read them with my finger. Both Bravermans watched very closely. At several points Max Braverman preferred to have me change something that I had originally written as his answer to the question. I made changes to his answers and asked him to initial them. When we got down to the bottom I asked him if he understood everything that was in the statement and he said he did. I asked him if it was true, he said he did. I asked him if he would sign it and he said he would and did in my presence.

Q. On that occasion, both before you started writing sentence by sentence as you say, and during the time when you did write, did you question him about what happened at M. Kraus & Brothers, Inc. at the time he bought the chickens?

A. Yes.

Q. Did you ask him that?

A. Yes, I did.

[fol. 120] Q. At that time did he say to you that his dealings were with one Oscar or with one Jack?

A. No, he did not, at that time or any other time.

Q. Did you talk in English with him?

A. I did, and sometimes he would repeat his English answer in Jewish.

Q. Was that addressed to you in Jewish?

A. To me.

Q. Do you understand Jewish?

A. Yes.

Q. I see. Now I show you Government's Exhibit 13 for identification and ask you if that is the paper on which you wrote (handing witness)?

A. That is.

Q. Before you asked Mr. Braverman to sign that did you advise him of any legal rights which he might have had?

A. We told him that—both Mr. Nagelberg and I told him that, both before writing out the statement during the course of the conversation with him and at the time that we asked him to find the statement.

Q. Did you tell Mr. Braverman that you were a notary?

A. No, I did not.

Q. Did you explain to him the meaning of these words written on the bottom "Signed and sworn to before me"?

A. I asked him if all the statements were true and he said they were. I said, "Do you swear that they are?" or words to that effect—I don't remember the exact words, but since I had written "Signed and sworn to" I mentioned "Do you swear that they are?" and he said he did, and I thereupon signed it after he did.

Q. Now how much time elapsed from the time you first started to write on this paper until the time when the signature was written in? How long did it take?

A. May I refer to some notes that I took at that time?

Q. Well, just give us your best recollection.

A. I think it was about a half hour—no, I shouldn't say that. I should say that we spoke to Mr. Max Braverman [fol. 121] for about a half hour when we started—I started writing possibly about ten minutes or fifteen minutes after we first started speaking to him. I should say about fifteen minutes during which I wrote.

.(Paper handed to Mr. Sahn by Mr. McAuley.)

Mr. Sahn: I object to that exhibit being offered in evidence on the ground that the government has no right to impeach the testimony of one of its own witnesses by offering the affidavit of that witness in evidence. They can use that affidavit just for the purpose of refreshing the witness's recollection but they cannot offer it in evidence.

The Court: I will overrule your objection but I am going to exclude it on other grounds.

Mr. McAuley: You won't accept it as a prior inconsistent statement?

The Court: That is the reason I am not letting it in. There isn't any doubt about it, but if I let it in I would instruct the jury that it is no proof of its contents.

Mr. McAuley: All right. That is all, M. Schubert.

Cross-examination.

By Mr. Sahn:

Q. You are an OPA investigator?

A. Yes, sir.

Q. Are you an attorney?

A. Yes, sir.

Q. Are you familiar with the laws of the State of New York with regard to the taking of testimony or the swearing in of testimony?

A. I can't say that I am.

Q. How long have you been practicing law?

A. About seven years.

Q. You do not know who has the right to swear a witness or an affiant on an affidavit?

[fol. 122] A. I know that there are some people who may. I don't claim to be familiar with all who may.

Q. Who are the people who may?

A. A Notary, a Commissioner of Deeds, certain court officers, an OPA investigator.



Q. An OPA investigator is allowed to act as a Notary Public?

A. An OPA—I don't know but I know that an OPA investigator may take an oath.

Q. May take an oath?

A. Yes.

Q. Was this the taking of an oath or was this the swearing of testimony?

A. I have been away from the practice of law too long—

The Court: I do not think you need apologize. What is the reason for this question?

Mr. Sahn: The witness has testified that he swore this—

The Court: What about it? What has his knowledge of law got to do with that?

Mr. Sahn: I just want to show the<sup>3</sup> jury that this is an investigator practicing law who does not know—

The Court: He just told you that an OPA investigator has the right to swear a witness.

Mr. Sahn: Well, I am not questioning him on that point. I believe the jury has a right to draw an inference that if this witness as a lawyer did not know certain things about certain—that is, certain elementary things about the practice of law, that they may infer that he has no knowledge about how to conduct an investigation.

The Court: Well, I will repeat what I said before. Go on to something else.

[fol. 123] Q. You were at the Braverman's place of business with Mr. Nagelberg?

A. That is right.

Q. And you said Mr. Nagelberg asked the questions of Mr. Braverman and Mr. Braverman answered them?

A. I do not recall saying that.

Q. Well, what did you say?

A. I believe I said we both asked questions and Mr. Braverman answered them.

Q. Mr. Braverman answered them?

A. And I wrote the answers.

Q. I believe you said that as Mr. Braverman answered the questions after they were put you wrote the substance down on that sheet of paper?

A. That is right.

Q. And that immediately after the questions were answered?

A. That is right.

Q. Now, towards the latter part of your testimony you said that first you spoke to Mr. Braverman for about ten or fifteen minutes and then you started to write?

A. That is right.

Q. Well, if you spoke to Mr. Braverman for fifteen minutes before you started to write how could you have put the substance of these questions and answers into the affidavit immediately upon his answering them?

A. We first spoke to Mr. Braverman generally, and then when we saw that we were interested in his answers we repeated the questions that were pertinent and I then wrote the answers at that time.

Q. You said that Mr. Braverman told you that he did not receive the chicken feet?

A. The first time we asked him the question he said he did not receive the chicken feet.

Q. And then he said he received them?

A. That is right.

[fol. 124] Q. His answers were inconsistent?

A. They were contradictory.

Q. They were contradictory. He lied either the first time he answered or the second time he answered?

A. That is right.

Mr. Sakn: That is all.

Mr. McAuley: That is all, Mr. Schubert.

(Witness excused.)

Mr. McAuley: Mr. Sweben.

(Bailiff went for the witness.)

The Bailiff: He is not here.

Mr. McAuley: Mr. Moskowitz.

HARRY MOSKOWITZ, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination.

By Mr. McAuley:

Q. Mr. Moskowitz, you are a butcher by trade?

A. Pardon me?

Q. You are a butcher?

A. That is right.

Q. And where is your shop?

A. 356 Ninth Avenue.

Q. New York City?

A. That is right.

Q. And how long have you been in the butcher business?

A. Well, I have been in the butcher business approximately, I should say about ten or twelve years but my dad owns the place—he has been there about thirty years.

Q. Can you give us a rough idea of the volume of business you do a year?

A. A year? Well, we do approximately—I would say about \$100,000 a year.

[fol. 125] Q. \$100,000 a year. I show you Government's Exhibits 14 and 15 for identification and ask you if you recognize those invoices (handing witness)?

A. I do.

The Court: What street is that between?

The Witness: Between 30th and 31st.

Mr. McAuley: I offer these in evidence.

Mr. Sahn: No objection.

(Government's Exhibits 14 and 15 for identification received in evidence.)

Q. How long have you been going to the market, Mr. Moskowitz, to make purchases for your own and your father's store?

A. Oh, I should say about a year prior to this year.

Q. You have a neighborhood trade?

A. What is that?

~~Q. You have a neighborhood trade?~~

A. Neighborhood trade, yes, sir.

Q. Does your shop ever specialize in an item known as chicken feet?

A. At one time we did.

Q. How long ago was that?

A. Oh, I should say about a year ago.

Q. A year ago?

A. About a year ago.

Q. Where did you get your feet from then?

A. Kraus.

Q. How would you buy them?

A. We bought them a barrel at a time.

Q. A barrel at a time?

A. Yes.

Q. When was that, do you recall?

A. I couldn't recall. I should say maybe the month of July or August or September, in between that range.

Q. Will you explain that a little bit more clearly?

A. I say, in between the three months, July, August or September.

[fol. 126] Q. Was that the first time in the twelve years that you were required to go out and buy a barrel of chicken feet?

A. Well, we weren't required to buy them but in fact I went down to the market and we saw that we could push it, a few chicken feet, and we did. We did not buy much. It may have been one barrel or two barrels or so.

Q. Will you explain to us the condition among your customers, the situation that led you to believe that you could conduct a profitable business on chicken feet?

A. Well, it wasn't profitable. It wasn't profitable. Here is the story behind it. Some people want bones. Some people want bones for soup and you couldn't get it because we weren't getting any beef at that time. I told the District Attorney at one time we couldn't get beef legitimately. Everybody knew it. All we did was sell lamb or pork, whatever merchandise we could get. People asked for bones so we told them we could give them chicken feet. Well, they wanted it and we bought a barrel or so. It did not amount to much, 100 pounds or 110 pounds. It did not amount to much.

Q. That was in July?

A. I should say in between that range, two or three months or four months.

Q. Was that occasion ever repeated?

A. Once in a while; very seldom.

Q. Well how often down to date have you bought that?

A. I should say once every two weeks.

Q. Mr. Moskowitz, I show you Government's Exhibits 14 and 15 in evidence. Do you recall the transactions of that day, November 24th, represented by these two invoices (handing witness)?

A. I recall picking up the merchandise. That is my signature on the tickets.

Q. On the tickets?

A. Yes, sir.

Q. Will you tell us what happened when you went to M. Kraus & Brothers, Inc., that day?

[fol. 127] A. Well, as far as I was concerned I did not want to handle any turkeys and my dad was home sick, and through the telephone at home he bought the merchandise. I went down to the market—

Q. No. Were you there when he bought the merchandise over the phone?

A. I was at the store.

Q. Was that the day before November 24th?

A. I couldn't tell you. It may have been the same day or the day before. I couldn't tell you.

Q. At any rate, you say your father told you to go down to the market?

A. That is right. He called me up at the store and told me to go down and get the merchandise.

Q. And he said to you that he had purchased merchandise?

A. That is right.

Q. Did he say what he had bought?

A. No, he said just turkeys.

Q. Now you went down?

A. Yes.

Q. Tell us each and everything that you remember which happened when you got down there to the market.

A. Well, I was down to the market and they called me in and told me they had 10 boxes of turkeys.

Q. Who called you in?

A. Somebody at the door.

Q. Do you recall who it was?

A. I don't remember who it was.

Q. Had you ever been there before?

A. Down at Kraus's house?

Q. Yes.

A. Yes, sir.

Q. Was it a stranger, a new employee?

A. I don't remember who called me in.

Q. Somebody called you in there?

A. Yes.

Q. Were you alone?

A. No, there was a lot of people in there.

[fol. 128] Q. A lot of people?

A. Yes, sir.

Q. Well, leaving out the retail butchers who might have been there, who was there who was affiliated with M. Kraus Brothers, Inc., do you know?

A. Well, there was, I should say, Mr. Balter.

Q. Who else?

A. I am just trying to think. Well, I know them by the first names. I wouldn't know them by the second names.

Q. All right, go ahead.

A. There was Mr. Balter, I know was down there, and I should say Oscar, and maybe a few more. Well, I can't remember.

By the Court:

Q. Who is Oscar?

A. I don't know; one of them working down there. I don't know his name.

Q. Don't you know what his duties were?

A. I think he was a bookkeeper there.

Q. How many people were employed there? You have been going there for a year?

A. Well, I would go down there and walk in for my merchandise and walk out. I didn't bother to speak with anybody.

Q. I know you didn't, but did you ever?

A. They have—yes, I did.

Q. Did you walk around the store?

A. Yes, also around.

Q. How many people did you see around?

A. I should say we would see maybe 12 or 14 people.

Q. Buying?

A. Buying? Oh, there may have been more than 12 or 14 buying.

Q. Are there 12 or 14 employees?

A. What do you mean by that?

Q. Were there 12 or 14 representatives of the Kraus firm on the floor?

A. Yes.

[fol. 129] Q. How do you know they are? How were they dressed?

A. Well, they are dressed in butcher gowns.

Q. 12 or 14?

A. Yes.

Q. You don't know any of them?

A. Well, I know them by sight. I wouldn't know them by name.

Q. Have you done business—

A. I only do business with the people in there, as far as people taking care of that department.

Q. Have you ever been in this department before?

A. In which department?

Q. The department you are speaking about?

A. Well, at that time—

Q. What department are you talking about?

A. I am talking about the place in general.

Q. How many employees are there in the place in general?

A. Well, I can figure out about 14.

Q. Now, did you go back to the place that you went down on the 22nd—is that the 22nd?

A. That is right. That is the place I am talking about.

Q. They were all there?

A. There was a bunch of them in there.

Q. Were all 14 in there?

A. Well, I couldn't say.

Q. How many were there?

A. I would say about 12 or 14.

Q. Had you done business with Oscar before?

A. No.

Q. The first time— How do you know his name was Oscar?

A. Well, I did not do business with Oscar. He was in the place. The District Attorney asked me how many people were in the place and how many people I remember seeing.

Q. Do you know the names of all 14?

A. No.

Q. How do you know Oscar's name?

A. Well, I know, because I happened to speak to the man.

[fol. 130] Q. Did you call him Oscar?

A. Well, I heard people call him Oscar.



Q. But you say you did not do business with him?

A. No, I did not do any business with him.

The Court: Go ahead.

By Mr. McAuley:

Q. Now, you went inside?

A. That is right.

Q. You say somebody brought out turkeys for you?

A. Yes, the man loading my truck.

Q. That was after you said "I am Moskowitz," is that right?

A. Yes.

Q. You had never been there before?

A. Oh, I was down there before.

Q. Well, these years that you have been there have you a pet salesman who takes care of your orders at Kraus's?

A. No pet salesman.

Q. Well, at any rate, you asked for some turkeys?

A. Yes.

Q. And some turkeys were put out on your truck?

A. That is right.

Q. Fine. Now, what happened?

A. Then I saw four barrels of chicken feet come out.

Q. You saw them?

A. Yes.

Q. Will you tell us how you knew they were chicken feet?

A. They were marked on the barrel, and I put my hand under it.

Q. You lifted up the cover and looked at them?

A. I lifted up the cover.

Q. Had you ordered chicken feet?

A. I did not do any of the ordering.

Q. Well, did your father tell you to pick up the chicken feet?

A. No, he did not tell me.

[fol. 131] Q. Did you do anything or say anything when you saw the chicken feet slide toward your truck?

A. Well, at first I didn't but then I asked what they were and he said "Your father bought them".

Q. Whom did you ask?

A. One of the men in there.

Q. Who was the man?

A. I don't remember who it was—one of the men that was marking tickets, I guess.

Q. Are you sure it wasn't Max Kraus?

A. No, sir, it wasn't Max Kraus.

Q. You are positive?

A. Positive.

Q. Absolutely positive?

A. Absolutely positive. I didn't speak to Max Kraus about that.

Q. Did you speak to him about something else?

A. No.

Q. You are positive you did not see Max Kraus that day?

A. I did not see Max Kraus—in fact I saw about 14 people but I did not see Max Kraus there that day. I mean when I went in to buy the poultry he may have been there but I did not see him.

Q. Did you see him in the movies that night at any place?

A. I did not see Mr. Max Kraus in the movies.

Q. Did you see him at all that day?

A. No.

Q. All right, go ahead with the recitation. Now, what happened? What did you say to anybody about chicken feet?

A. Well, I just told him—I asked him what the chicken feet were about and he said "Well, your dad bought them," and I did not question him. I just took them out.

Q. They told you that?

A. That is right.

Q. Who gave you the two bills?

A. Well, they were charging them out and they gave me the ticket and I signed for them. I checked over the weights, saw what the weights were and took them right on the truck, a man loaded them on the truck.

[fol. 132] Q. Do you know what you did with the chicken feet?

A. Well, what I did with the chicken feet? Well, we couldn't sell them so dumped them.

Q. You dumped them?

A. That is right. We kept them for a week and we couldn't sell them and so we dumped them.

Q. Did you try to sell them?

A. I did.

Q. Did your father try to sell them?

A. My father wasn't in the place at that time.

Q. I see. You were in complete charge?

A. That is right.

Q. And both of these bills were paid?

A. That is right.

Q. Did Max Kraus phone your house on the day at 3:30 o'clock in the afternoon?

A. Did Max Kraus phone the place?

Q. Yes.

A. I wouldn't know. The bookkeeper answers the phone, that there was a call at the house from Kraus that the turkeys were ready but that is all I know about it.

Mr. McAuley: Will you mark this for identification.

(Marked Government's Exhibit 16 for identification.)

Q. You can read English, can you, Mr. Moskowitz?

A. Yes, sir.

Q. Is that correct?

No difficulty with any of the letters of the 26 in the alphabet?

A. No.

Q. Is that your signature (handing witness)?

A. That is right.

Q. Is that your signature on the second page?

A. That is right.

[fol. 133] Q. Will you read that paper, please, and see if it refreshes your recollection as to whether or not most of your dealings—Well, see if it refreshes your recollection.

(The witness reads.)

Q. Does that refresh your recollection, Mr. Moskowitz?

A. It refreshes my recollection when I was down here a short time ago speaking to you. I think you made some corrections in that.

Q. Now I show you this paper and ask you if that refreshes your recollection—between the two lines (handing witness)? (Witness examines.)

Q. Have you read both of those?

A. Yes. I still say that one part is wrong there.

Q. Does either one or both refresh your recollection?

A. It refreshes my recollection except that one item there.

Q. Just a minute. Does it refresh your recollection as to who personally handed you these bills and with whom it was you had a conversation about the barrels of chicken feet?

A. There was one man I spoke to about the chicken feet—

Q. Wait a minute.

A. Yes, go ahead.

Q. I am asking you whether it refreshes your recollection. You have read what is there?

A. I did, yes.

Q. You read what is in your statement?

A. That is right.

Q. And this is in December, is that correct?

A. November.

Q. This was in April of this year, April 19th?

A. That is right.

Q. Are they the same?

A. To a certain extent.

Q. As far as the identity of the individual who personally handed you these two bills is concerned, are they [fol. 134] identical?

A. The persons that handed me these bills? Yes.

Q. They are identical—the statements?

A. No, not the statements.

Q. Are they identical?

A. They are identical.

Q. And one was taken in—

A. That is right.

Q. —November?

A. That is right.

Q. And this was taken in the month of April?

A. That is right.

Q. Now, I ask you does either or both of those refresh your recollection as to who the man was to whom you talked down at M. Kraus & Brothers, Inc., and who the man was who personally handed these two pieces of paper to you and the man to whom you personally addressed conversation after you got these two?

A. These two tickets—

Q. Just a minute.

A. Wait.

Q. Does it refresh your recollection?

A. Yes, to a certain extent. Now, here is the idea: These two tickets were made out by two different people—

Q. Yes.

A. (Continuing:) —they were made out by two different people.

Q. Yes. Who are the people?

A. Let me see if I can remember the names. (Examining.) I can't figure out whose handwriting they are.

Mr. McAuley: Now, your Honor, I would like, since I think this is important, to read, if I may, to attempt to refresh this witness's recollection by—

The Court: Do you know what refreshing your recollection means?

The Witness: Yes, trying to remember.

The Court: After you saw those papers—

[fol. 135] The Witness: Well, you see—

The Court: You had better allow me to finish the question. After reading those two papers do you remember what happened more clearly last November 22nd and 23rd?

The Witness: Your Honor, I do not remember who the people are who marked these tickets up.

The Court: I am not asking you about that. I suppose there is no use of asking you any further.

Mr. Sahn: I object to the reading of any question or answer from any statement into the record on the ground that the reading of such statement constitutes an offering of the statement itself into the record indirectly.

The Court: Overruled.

Q. Were you in my office, Mr. Moskowitz, on April 19th in the presence of Mr. McNamara, Mr. Tick, myself and Miss Urban, a stenographer?

A. I was.

By the Court:

Q. Is your recollection refreshed after reading those two papers here this morning about what happened that day down there?

A. Yes, it is.

Q. Well, as the result can't you answer the question who gave you those two sales tickets?

A. There is two different people who marked the tickets.

Q. Nobody asked you who marked them. The question is, who gave them to you?

A. That is what I am trying to figure out.

Q. Those two statements that you gave, one in November and one in April of this year, do they help you to remember?

A. Not these two tickets.

[fol. 136] Q. You knew then in December and April who gave you these tickets?

A. Who gave me these tickets?

Q. When you gave those two statements you knew who gave you those two tickets, didn't you?

A. No, I did not.

Q. I thought you said you did?

A. No, I did not.

By Mr. McAuley:

Q. May I, before I start reading, ask you just one question, Mr. Moskowitz: Does the reading of these two papers refresh your recollection on one point, and that is whether on November 24th when you bought these turkeys Max Kraus was personally present and whether you talked to Max Kraus in connection with it?

A. No—

Q. Just a minute.

A. Yes, go ahead.

Q. Do these two papers refresh your recollection as to whether on November 24th Max Kraus was present and whether you talked to him?

A. I did not talk to him and he wasn't present. If it is in there it is a mistake in that statement and I tried to correct it and I told it to you.

Q. You were there in the office, is that correct?

A. Yes, sir.

Q. Now did I ask you this question:

“Q. Mr. Moskowitz, you have just heard me read the sworn affidavit which you gave on the 3rd day of December, 1943, to Agent Norman McNamara of the OPA. You have made a correction in that affidavit as follows: You say that, on November 24, instead of reading ‘I bought 875 pounds of turkey at M. Kraus & Brothers’, your affidavit should read ‘My father, Philip Moskowitz, made the purchase over the phone and then I, Harry Moskowitz, went [fol. 137] to M. Kraus Brothers to effect delivery.’”

Did I ask you that?

A. You did.

Q. And did you answer “That's right”?

A. That's right.

Q. Did I then ask you:

"Q. Do I understand you that in all other respects the transaction which you had on that day, November 24, 1943, with M. Kraus & Brothers, as described in that affidavit is accurate and true?"

Did I ask you that question?

A. You did.

Q. And did you answer "That's right"?

A. That's right.

Q. And did I ask you:

"Q. On November 24, it is correct that you purchased 875 pounds of turkeys at  $39\frac{1}{2}$ ,  $40\frac{1}{2}$  and  $42\frac{1}{2}$  cents a pound for \$358.59?"

Did I ask you that question?

A. You did.

Q. And did you answer it "Yes"?

A. Yes.

Q. Did I ask you:

"Q. Is it correct that, on that day, in connection with that purchase, you were compelled to buy 427 pounds of chicken feet at 15 cents a pound, for a total of \$64.05, which said chicken feet you did not wish to buy?"

Did I ask you that?

A. You did.

Q. Did you answer: "A. I am trying to tell you. The whole transaction was done over the phone, I guess the chicken feet, too, because he made me take it. Yes."

Did you answer that?

A. I did not get that. Will you read that again?

Q. I will read the answer: "I am trying to tell you. The whole transaction was done over the phone, I guess the chicken feet, too, because he made me take it. Yes."

Did you give that answer?

A. Maybe I did.

[fol. 138] Q. Well, did you?

A. I guess I did. If it is in there I guess I did.

Q. Did I ask you:

"Q. Do you agree with the other butchers who will testify that, in your retail business, there is no market for chicken feet at 15 cents a pound?"



Did I ask you that?

A. You did.

Q. Did you answer "That's right."

A. That's right.

Q. Did I ask you:

"Q. You never purchase chicken feet for sale in your business?"

Did I ask you that?

A. You did.

Q. Did you answer it "Yes, at one time."

A. That is right.

"Q. On a small scale?"

A. That is right.

Q. Did I ask you that?

A. Yes.

Q. And did you answer "Yes, barrel."

A. Yes.

Q. Did I ask you:

"Q. At this time, did you have any demand in your business to warrant the purchase of 427 pounds of chicken feet at 15 cents a pound?"

Did I ask you that?

A. You did.

Q. And did you answer: "Maybe for about 10 or 20 pounds but not that much."

A. That is right.

Q. Did I ask you this:

"Q. When M. Kraus said 'I have four barrels of chicken feet for you', did you say 'What am I going to do with them?'"

Did I ask you that?

A. You asked me that but I answered—

Q. Just a minute.

A. Go ahead.

Q. Did I ask you that?

A. You did.

Q. And did you answer: "That's right"?

A. No.

[fol. 139] Q. Your recollection is that you did not answer "That's right"?

A. I answered that one party in Kraus's spoke to me. I did not mention any names.

Q. Just a moment.

A. Go ahead.

Q. I will read the whole statement so you will see what your answer is—

Q. Did I ask you this question:

“Q. Had your father told you to expect the four barrels?”

Did I ask you that?

A. You did.

Q. Did you answer as follows: “My father wasn't in the store at that time. Let me explain. All I know, a week before Thanksgiving, I was speaking to certain people, in fact Max said ‘I don't want to handle turkeys.’”

A. Wait a minute, pardon me.

Q. Just a moment.

A. Pardon me before you go any further.

Q. Let me read the whole thing.

A. Pardon me, before you go any further, you have that all wrong.

The Witness: Your Honor—

The Court: Which one?

A. (Continued) You have that all wrong. The party I spoke to, about “Max” was McNamara down there at the market, that I don't want to handle any turkeys—not “Max”, but McNamara—

The Witness: Am I right, Mr. McNamara?

Q. That is all right. Don't get excited. Whatever is the truth we will clear it up. “Max” should be “Mcnamara”, is that right?

A. Yes.

[fol. 140] Q. (Continuing)—“in fact McNamara said ‘I don't want to handle turkeys. You can't make no money on them.’ Thanksgiving Eve, Thanksgiving Day, my father called me up in the house. He said, ‘You are going to have turkeys.’ He don't mention how many or what. About 3:30 in the afternoon, Kraus called me up”—“called me up”—“Kraus called me up.”

A. That is right.

Q. (Continuing) " 'Come down, I have 10 boxes of turkey for you.' I went down. When I got there, he said, 'Put them on your truck.' I put them on my truck. He said, 'Come back. I have 4 barrels of chicken feet for you.' I said, 'What are they for?' He said, 'Take them out. They're yours.' I said, 'What am I going to do with them?' He said, 'I'm not interested.' "

Did you give that answer?

A. I did, but I did not mention any specific—I did not mention any names, Mr. McAuley.

Q. Who is he, Charley?

A. No. One of the men down at the house—whoever made out these tickets. Whoever made out these tickets in particular.

Q. Did you hear the question?

A. Yes, I did.

Q. Which preceded this?

A. Yes.

Q. I read this question before and you gave an answer: "When Mr. Kraus said 'I have four barrels of chicken feet for you,' did you say 'What am I going to do with them?'"

A. That's right." Whoever mentioned it——

Q. Just a minute.

A. Go ahead.

Q. Did I ask you that question?

A. You did.

Q. And did you give that answer?

A. I did. I may have said that——

Q. All right, that is all. Just a minute.

A. But——

[fol. 141] Q. Just a minute. Did I ask you this one—— Would you mind looking at me?

A. Go ahead.

Q. Did I ask you this question: "Q. He gave you bills #1279 and 1214? He gave you the bills?" Did I ask you that?

A. You asked me that.

Q. Did you answer: "Yes."

A. But he couldn't give me the bills because——

Q. Just a minute——

A. Go ahead.

Q. Did you answer "Yes"?

A. Yes.

Q. If this is incorrect or true we will let you straighten it out later.

A. O.K. "Q. And you noted that you were charged for the 427 pounds of chicken feet at 15 cents a pound?"

A. I didn't get that.

Q. Were you asked that?

A. Yes.

Q. The question about chicken feet—did I ask you that?

A. Yes.

Q. And did you answer "Yes, I had to sign."

A. That is right.

Q. Did I ask you: "Did you pay for them right then and there?" Did I ask you that?

A. You did.

Q. Did you answer "No, we pay by check. They were on a statement and we paid according to the statement."

A. That is right.

Q. Now, were you asked this question: "Q. Did Kraus say to you, 'Take them out of here. Dump them the same as all the other butchers.'" Did I ask you that?

A. You did.

Q. And did you answer "Words to that effect."

A. That's right.

Q. You answered that?

A. That is right.

[fol. 142] Q. Were you asked this question: "Q. Did you ever make any comment to Kraus along the lines: 'So this is your way of getting around the ceiling price?'" Did I ask you that question?

A. You may have. I don't remember.

Q. And did you answer "No, I never passed that remark."

A. That is right, I may have. I don't remember that statement. "Q. Did you ever say 'Think you are going to get away with this?'" Did I ask you that?

A. You may have.

Q. And did you answer "No"?

A. I don't know whether I did.

The Court: I will give the jury a recess.

(Short recess.)

Q. Mr. Moskowitz, is there anything that you now recall about the transactions indicated by this paper (handing witness)?

A. I am just trying to figure out who marked these tickets and then I can tell you the whole story on that part, but I just can't remember who marked these tickets. (Examining.)

Q. Take your time.

A. I am just trying to remember who marked these tickets. Then I can tell you what this whole thing is about.

Q. Well, maybe you will recall later. Just put them down for the moment. Now, how many years did you say you have been dealing—you and your father—with Max Kraus & Brothers, Inc.?

A. Oh, I imagine about twenty or thirty years.

Q. And how many years have you been going to M. Kraus & Brothers, Inc.?

A. About a year.

[fol. 143] Q. About one year?

A. Yes.

Q. That is, to do the shopping?

A. To do the buying.

Q. To do the buying?

A. Yes.

Q. And how many times a week would you go?

A. About twice a week.

Q. Twice a week?

A. Yes.

Q. So roughly 100 times, is that right?

A. Yes.

Q. 90 to 100 times in the last year?

A. That is right.

Q. During this period, the summer and early fall of 1943 was the transaction indicated by these two invoices the only two transactions of the kind you had where you were billed for feet or were these others?

A. Well, we bought feet. That is about the only thing, we bought that one or two barrels.

Q. I mean have you been buying poultry during the summer?

A. We were.

Q. And during the fall and winter of 1943?

A. We were.

Q. Were you buying poultry up to April 19th?

A. Of this year?

Q. Yes.

A. We were.

Q. Did you buy any poultry last week?

A. I didn't buy. My dad bought the last week. I imagine he had a couple of barrels of poultry.

Q. Last week?

A. Last week.

Q. Kraus is still giving you trakeys?

A. No, sir.

Q. Chickens?

A. Chickens.

Q. He is still giving you chickens?

A. That is right.

Q. And that is as late as last week?

A. That is right.

Q. Since this case came up have you and your father attempted to purchase poultry from other wholesalers?

A. They won't sell us.

Q. They won't sell you?

A. No, sir.

[fol. 144] Q. Did you ever try to do business with Cudahy?

A. We did.

Q. And they won't sell you?

A. They refused to sell us. We tried to do business with Armour & Company, Swift & Company, Wilson & Company, and they all refused to sell us.

Q. So is it a fact then, so far as you know Kraus is the only one who will sell you?

A. Poultry.

Q. Poultry, that is what I mean.

A. Yes.

Q. Would that fact lead you to commit perjury on this stand?

A. No, I wouldn't commit perjury for nobody.

Q. You are sure about that?

A. Positively.

Q. Even though up until today you have no place else to buy poultry except Kraus Brothers?

A. Kraus refused to sell us poultry, the same as we did with beef at one time. We couldn't get beef, and we refused to sell beef.

Q. Have you gone to the market twice a week for the last month or two?

A. I haven't been to Kraus since last December.

Q. All right. Now during last summer and early fall you went twice a week and you were buying poultry, is that right?

A. That is right.

Q. Do you get it, just poultry, what you pay for?

A. Just poultry.

Q. Did you get any necks, gizzards, chicken wings?

A. Once in a while we get some chicken livers.

Q. How about chicken skin?

A. No, not chicken skin.

Q. Feet?

A. No feet.

Q. How about gizzards?

A. Once in a while we get 20 pounds of gizzards and we would sell them.

Q. Well I am not asking you whether you sold them.

A. No, we would get them.

[fol. 145] Q. Would you request them?

A. No, we did not request them.

Q. You did not request them?

A. No.

Q. Did you get any gizzards last week?

A. No.

Q. Did you request them?

A. No.

Q. You paid for them, is that right?

A. No, we didn't get them. We weren't paying anything. The only thing we paid anything on our statements or on the bills. We paid according to the bills.

Q. Is it fair to state that the transaction of last November 24th in connection with these turkeys is not exceptional but typical—do you know what I mean?

A. No, I don't.

Q. With almost every purchase of poultry you get something else; you are billed for something else?

A. Sometimes.

Q. Have you ever had any conversations with Kraus about the fact that he is the only one who would sell you poultry?

A. No, I don't tell anybody my business.

Q. No. Have you ever talked that over with him?

A. No.

Q. Did you ever have a talk with Mr. Kraus in your life, Mr. Max Kraus?



A. Have I ever had a talk with him?

Q. Did you ever say "Hello" to him?

A. I said "Hello" to him.

Q. Where?

A. Down in the market.

Q. Where, in the street?

A. In the street.

Q. Did you ever see him inside his own premises?

A. I saw him once in a while.

Q. What do you mean by "once in awhile"?

A. If he happened to be in the place I said "Hello" to him.

[fol. 146] - Q. I mean how often was that?

A. I would say once every month or once every two months. It is very seldom that I saw him down there.

Q. Do you know his brother?

A. Which brother?

Q. Max Kraus's brother?

A. I know a couple of his brothers.

Q. Did you ever see them around?

A. One of them in particular.

Q. Well, of the 100 times or so that you went to the market in the last year, that is, you went inside the premises of M. Kraus & Brothers, Inc. either at 20 Tenth Avenue or 59-68 Little West Twelfth Street—at either of those places—of the 100 times that you went, how often did you see Max Kraus?

A. I would say maybe 10 times—10 times.

Q. And on those occasions did you have a talk with him?

A. I said "Hello". He asked me how my dad was and that's all.

Q. Did you ever complain about paying for this stuff which you threw away?

A. If I complained about it?

Q. Yes.

A. I passed a remark to somebody down there but that's all.

Q. I mean to Max Kraus?

A. No, I did not.

Q. You know he is the president of the concern?

A. I suppose so.

Q. I mean are you just guessing?

A. I know he is boss of it.

Q. Did you ever complain to the top man?

A. No, I did not see the top man.

Q. Just to the helpers?

A. That is right.

Q. You haven't felt like complaining, have you?

A. It didn't do any good no matter who you complained to. It never does any good.

[fol. 147] Q. How do you know?

A. Because we tried it with other concerns.

Q. Do I understand that you tried it with other concerns but you never tried complaining with M. Kraus & Brothers, Inc.?

A. We complained when there happened to be a shortage in the barrels and told him about it.

Q. I am not talking about shortages in the barrels. I am talking about being billed for feet?

A. We never complained because we were lucky to get any merchandise. We were lucky to get any merchandise. In fact, whenever the OPA asked me to cooperate with them I did. And as far as anything else I told people in the OPA that we couldn't get any merchandise from any of the packers in New York City.

Mr. McAuley: All right, that is all.

A. (Continued) And they told us—

Mr. McAuley: All right.

The Court: Do you do \$100,000 business a year?

The Witness: Yes. We do about \$2,000 a week.

The Court: What kind of a neighborhood is it?

The Witness: Well, we have Sears, Roebuck, and the Post Office right across the street.

Cross-examination.

By Mr. Sahn:

Q. You are familiar with the physical setup of the Kraus establishment, aren't you?

A. What do you mean by "physical"?

Q. They have a place on 14th Street?

A. That is right.

Q. Near Ninth Avenue, is that correct?

A. Yes.

[fol. 148] Q. And they handle poultry in that place?

A. That is right.

Q. That is their poultry branch, is that correct?

A. That is correct.

Q. Then they have a place on Tenth Avenue?

A. That is right.

Q. What do they handle on Tenth Avenue?

A. Well, when they had beef they handled beef, pork, lamb, veal, and at one time they handled poultry there, too.

Q. That is their beef and provision place today?

A. That is right.

Q. They have a railroad siding there on Tenth Avenue?

A. I don't know. I don't know anything about it.

Q. But you do know when they received turkeys by freight car they handled them on Tenth Avenue because of the railroad siding?

A. Well, I wouldn't know that.

Q. Do you know where Max Kraus has his office, at 14th Street or Tenth Avenue?

A. What do you mean by that?

Q. Where does Max Kraus personally and the book-keepers—where are the administration facilities of the firm, if you know—in the 14th Street place or the Tenth Avenue place?

A. I think it is the Tenth Avenue place.

Q. You think it is on Tenth Avenue?

A. Yes.

Q. And when you came throughout the entire year to buy your poultry, where did you go, to 14th Street or Tenth Avenue?

A. To 14th Street.

Q. And the office facilities or Max Kraus's offices are not at 14th Street?

A. Well, we get bills from the 14th Street place, so there must be an office at the 14th Street place, too.

Q. Exactly, but what I am trying to bring out is, if you know, where the offices are, at 14th Street or Tenth Avenue?

A. The main office you mean?

[fol. 149] Q. Yes.

A. I think on Tenth Avenue.

Q. Tenth Avenue?

A. Yes.

Q. And when you come down to 14th Street to buy poultry throughout the year whom do you generally speak to?

A. Well, Mr. Nathan Lotto.

Q. He is the sales manager at 14th Street?

A. Well, he is the person I always dealt with.

Q. And you always place your order with Mr. Lotto?

A. That is right.

Q. And Mr. Lotto is the man who always sells the poultry to you?

A. That is right.

Q. Now on November 24th you say you did not buy these turkeys but your father bought them?

A. That is right.

Q. And you did not buy the chicken feet either?

A. No, sir.

Q. The entire transaction, whenever it was, was arranged by your father?

A. That is right.

Q. All you were was the pick-up agent, is that correct?

A. Well, I wouldn't call myself that. I just went down and picked up the merchandise and signed for it.

Q. Exactly. You went down to pick up the merchandise and you signed for it?

A. That is right.

Q. You did not order it?

A. No.

Q. You did not buy it?

A. No.

Q. Now you referred to the handwriting on the ticket. You say you cannot recall whose handwriting it is?

A. That is right.

Q. Let me ask you this: The man who wrote that ticket is the man who gave it to you, is that correct?

A. That is right.

Q. You are positive about that?

A. Positive.

Q. So that if Max Kraus did not write out this ticket, Government's Exhibit 14 and Government's Exhibit 15, [fol. 150] then there is no question but that Max Kraus did not give you these tickets?

A. Max Kraus did not give me them tickets, no.

Q. But customarily when you went to the place to buy poultry the man who handed you the ticket always was the man who wrote out the ticket?

A. What do you mean?

Q. When you got a ticket——

A. For poultry?

Q. For poultry?

A. The man that sold me the poultry never made out the ticket.

Q. Who made out the ticket?

A. Whoever put it on the truck.

Q. I asked you before whether the man who made out this ticket gave it to you?

A. Them tickets, yes.

Q. No tickets, so that if Max Kraus did not make these out he couldn't have given them to you?

A. That is right.

Q. And your independent recollection, aside from that is that Max Kraus did not speak to you that day?

A. No, I do not think so. He may have, but I don't remember whether I saw him or not or I spoke to him or not. I am not sure.

Q. Did you ever see me before?

A. No.

Q. Did you ever speak to me before?

A. No.

Q. Did you ever speak to me before?

A. No.

Q. Did you ever speak to anyone connected with my office?

A. No.

Q. Now you testified about a call at home or at your place, to the effect that Kraus had called?

A. That is right.

Q. That the turkeys were ready?

A. Yes.

Q. Did you understand that conversation to mean that Max Kraus had called or that the firm of M. Kraus had called?

A. The firm of M. Kraus called.

[[fol. 151]] Q. That is right. No one told you that Max Kraus called?

A. No.

Q. And when you referred in your talk with the District Attorney on one occasion to Mr. Kraus you were referring to the firm of M. Kraus & Brothers, Inc.?

A. I wasn't referring to the firm or anybody. I was referring to a certain party, the party I spoke to.

Q. But you were not referring to Max Kraus?

A. I wasn't referring to anybody.

Q. You were referring to the organizational setup itself, to the particular individual who was speaking to you at that time?

A. That is right.

Q. But not to Max Kraus?

A. Well, if Max Kraus spoke to me I am referring to him. If somebody else spoke to me then I am referring to somebody else.

Q. But you said you did not speak to Max Kraus?

A. That is right.

Q. Did you ever receive poultry around the same period of time, the month of November or December, 1943, from M. Kraus & Brothers, Inc.?

A. Poultry?

Q. Without buying chicken feet?

A. Sometimes. Without buying chicken feet? Yes. We bought a barrel or two of chicken feet.

Q. Did you ever receive turkeys from M. Kraus & Brothers, Inc. around that time without buying chicken feet?

A. In what month?

Q. In the month of January—January 6th, 1944.

A. I wasn't there at that time.

Q. You weren't there?

A. I wasn't there with my dad at that time.

Q. Do you know whether your father received turkeys without buying chicken feet?

A. I don't know.

Q. Do you know whether your father received turkeys on January 10th without buying chicken feet?

[fol. 152] A. This year I don't know anything until March. I wasn't with him from Christmas Eve until the beginning of March.

Q. You were out of the business?

A. I was out of the business.

Q. Can you tell us about how many times you purchased poultry from M. Kraus Brothers, in the months of November and December, without getting chicken feet or livers or gizzards?

A. I don't remember.

Q. I show you this ticket and ask you whether that refreshes your recollection (handing witness)?

A. There is no signature on there. I wouldn't know.

Q. Well, would you remember whether your firm received the chickens called for by that ticket?

A. Maybe. I wouldn't know unless there is a signature on it, who picked it up or who did not pick it up.

Q. Do you remember receiving those chickens without getting any offal that day?

A. I don't remember.

Q. I show you this ticket and ask you whether you remember receiving three barrels of chickens called for by that ticket (handing witness)?

A. I wouldn't remember unless I see the signature on there and know who picked it up, whether I picked it up or my driver picked it up. Then I would know what it is all about.

Q. I show you this ticket and ask you whether you remember that ticket (handing witness)?

A. Yes, that is my driver's ticket.

Mr. McAuley: Your Honor, may I ask whether he is producing all those tickets? On the invoice ticket there is an extra item.

Mr. Sahn: Well, this witness can—

Mr. McAuley: I just want to know whether you will produce all your records.

[fol. 153] Mr. Sahn: I am producing the records of all sales of poultry to this man without any offal being sold to him, and I am asking him whether this refreshes his recollection.

The Court: The jury, of course, will disregard that statement as a statement of fact.

The Witness: This one is my driver's signature.

Q. Do you recall at this time whether you received any gizzards or chicken feet on that sale?

A. I don't remember that.

Q. But you do remember that you had purchased poultry without receiving chicken feet?

A. Sometimes.

Q. Is that correct?

A. That is right.

Q. And you do remember that you did not purchase the turkeys or the chicken feet on November 24th?



A. No, I didn't purchase it.

Q. Your dad purchased it?

A. That is right.

Q. And you do remember that you did not speak to Max Kraus on November 24th?

A. I don't remember whether I did or not. I am trying to tell you.

Q. You don't remember?

A. No.

Q. But you cannot testify that you did speak to him?

A. That is right. I don't remember whether I did or not.

Mr. Sahn: That is all.

Redirect examination.

By Mr. McAuley:

Q. Mr. Moskowitz, would you read each and every one of the 92 words—

A. I saw that—

Q. —Well, I want you read each and every one of the 92 words in this second paragraph.

A. I know what it says.

[fol. 154] °Q. Well, I want you to read it again very slowly—very slowly.

(The witness examines.)

Q. Each and every word. Have you read it very slowly?

A. Yes.

Q. And did you read that before you signed it?

A. I glanced over it.

Q. And did Mr. McNamara talk to you back in November before you signed it?

A. I spoke to Mr. McNamara.

Q. Are those 92 words the truth or are they a lie?

A. Part of it is the truth. Certain parts are there that don't belong in there, a mistake on my part—I shouldn't say a mistake on my part; more nervousness on my part, trying to cooperate with everybody.

Q. Will you tell us what is true and will you tell us what is a mistake upon your part caused by nervousness?

A. Well, the part over here that I bought the turkeys.

Q. Yes—just a moment. Let us go slowly.

A. Yes. Right at the beginning, that I bought other chickens.

Q. That is an error and that has been corrected?

A. Yes.

Q. And it was caused by nervousness and that has been corrected?

A. Yes.

Q. Go on and read slowly.

Mr. Sahn: Just a moment. I have no objection to the witness stating what part is truthful and what part is in error if the reading of that refreshes his recollection and he testifies without reading from the paper itself.

[fol. 155] The Court: I will allow the question but I do not want the witness to read the parts of it aloud. I think the United States Attorney had better reframe the question.

Mr. McAuley: I meant read it silently, your Honor. I did not mean read it aloud. I meant read it silently.

A. I know, but you want me to tell you which is correct and which is incorrect, by taking certain phrases there, I can tell you which is correct and which is incorrect.

Q. Does that paragraph there which you read—does that cover substantially the matter to which you have testified here in court under oath today?

A. Most of it.

Q. So that in reading any part of that to yourself or even repeating it aloud, you would not be telling anything to which you have not already testified, is that correct?

A. I have testified everything I know.

Q. All right.

A. Except what I tried to tell you is not—

Q. Without reading aloud, you have read, I assume, that 7-word sentence (indicating)?

A. That is where I tried to explain—tried to bring out before—

Q. Just a minute. You have read that 7-word sentence?

A. Yes.

Q. And the two words of the following sentence?

A. Yes.

Q. Those nine words—they are really the only nine words I care about. You have read them?

A. I did.

Q. Now are those words the truth or are they a lie?

A. Well, as far as being on that paper it isn't true.

Q. What do you mean "as far as being on that paper"? They are on the paper, aren't they?

A. They are.

[fol. 156] Q. And are they a lie?

A. They are.

Q. They are not accurate?

A. They are accurate—just them nine words?

Q. Yes.

A. They are not accurate, because I never mentioned that name when these were written. I just glanced over it and I signed it. In fact I told these people that took this affidavit—

Q. You recall Mr. McNamara?

A. I do recall Mr. McNamara. In fact I consider Mr. Tick and Mr. McNamara fine people and fine friends.

Q. All right.

A. But I am not trying to go against the government or against anybody. I am trying to do what is right, but this part, when I passed that remark, that wasn't for that party itself. That was for the house itself, the corporation itself.

Q. But you read—

A. Yes, I did.

Q. —You read it before you signed it?

A. I glanced over it.

Q. Did you correct it?

A. I did not correct anything then because when people come into a butcher shop on a Friday night, when you are busy, you want to get everything done and done with.

The Court: You said that you don't remember whether you talked to the identity of the individuals that you talked of there (indicating). Having read that, do you remember?

The Witness: No, I didn't speak about that.

The Court: Did you remember it then when you signed it?

The Witness: Well, they come into the place and they asked me questions and they wrote the answers down. I may have said something.

[fol. 157] The Court: That day you thought you remembered?

The Witness: That is right—No, I did not say I thought I remembered.

The Court: Did you have reason to believe that your recollection is faulty?

The Witness: This may be right (indicating). I am not saying it is wrong but I don't remember that part. You

see, I am under oath here. I do not want to go against the government. I do not want to be held up for anything. This may be right.

The Court: Nobody wants you to testify to anything except what is the truth.

The Witness: That is right.

Q. Do I understand you to say then that these words, seven and two, or nine words may be right?

A. May be right, yes.

Q. Now, will you stand up and take a very good look at Max Kraus, the defendant.

(The witness stands in the witness stand.)

A. Yes.

Q. Take a very good look and then sit down and read these nine words, and see if you cannot tell us whether they are right or they are wrong—100 per cent. right or 100 per cent. wrong.

A. I couldn't answer that.

Q. Well take your time. You haven't given yourself a chance to refresh your recollection.

A. Well, I am trying to figure out everything.

Q. Give yourself a chance. Take it easy.

[fol. 158] (The witness examines.)

The Court: Any more questions?

Q. Have you—

A. I still think that should be Mr. Kraus or somebody else down there but it shouldn't have been that name in there, Mr. McAuley.

Q. You cannot positively say that this is not wrong?

A. No, I can't say positively anything.

Q. Therefore before you testified that it definitely was not Mr. Kraus—

A. No, I did not.

Q. Yes, you did.

A. I said definitely it wasn't Mr. Kraus that handed me the bills.

Q. Well, let us forget the question of the bills; on the question of who was the person with whom you had the conversation about the chicken feet, and the most important question, who waited on you—that is what I am interested in, who waited on you. You know what "waited" means?

A. Yes. Nobody waited on you—nobody waited on you.

Q. Who said anything or did anything to you or with you while the tom turkeys were carried out to your truck. I call that waiting on you.

A. I was outside waiting for the lugger to put the stuff on the truck.

Q. On the question of who waited on you, with whom you said anything or had dealings that day.

A. Whoever made out the tickets.

Q. Just a moment. Do you say anything about tickets in this statement?

A. No, it wasn't asked me.

Q. Let us forget all about tickets right now.

A. Well, that is the only one who waited on me.

Q. Are you positive?

A. Yes.

Q. Is this the bookkeeper who makes out tickets?

A. No, not on Christmas and Thanksgiving.

[fol. 159] Q. I understand each and every person makes out—

A. Whoever has got the books on hand—it could be the bookkeeper, it could be the man in charge of a different department.

Q. Well all the salesmen on the floor make out tickets, is that right?

A. Well, I don't know; some did.

Q. What happened here?

A. What do you mean?

Q. Do you positively recall what happened here?

A. Whoever made out the tickets told the man to push out them turkeys. That is what I am trying to bring out.

Q. Do you think a fellow Marty waited on you and gave you the bills?

A. No.

Q. Are you sure?

A. I am not sure of anything. If I could remember who made them tickets out why I could tell you who that party is.

Q. Was it Louis?

A. Louis?

Q. Yes.

A. I don't know anybody by that name down there.

Q. Well, who do you know down there?

A. Well, I am telling you, I know Nathan Lotto. He is in the 14th Street house. There is a couple of luggers down there that I know by name, and in the other house I know Mr. Harriss, in charge of the lamb department. I know Mr. Balter of the beef department.

Q. Well, let us talk turkey.

A. Well, turkey, there is nobody on the 40th Avenue side who handled turkeys.

Q. Whom do you and your father transact business with when you buy turkeys? You do not transact business with a lugger, do you?

A. We were buying turkeys all the time from the 14th Street house when we did buy turkeys.

[fol. 160] Q. Whom had you transacted business with when you had bought turkeys, no matter where you bought them? —

A. Nathan Lotto.

Q. Nathan Lotto, is that correct?

A. That is correct.

Q. Now was it Nathan Lotto with whom you transacted this business on November 24th?

A. I don't know who transacted the business. All I know is who made out the tickets. If I could remember the handwriting then I know that man pushed them turkeys out.

Q. You have read this. Did you mention back in November to Mr. McNamara about Nathan Lotto?

A. No.

Q. Did you mention in November about anybody else?

A. I wasn't asked that.

Q. Well, were you asked who waited on you?

A. No.

Q. You weren't asked that?

A. Wait a minute. Maybe I was.

Q. Now take it easy.

A. Maybe I was.

Q. Just those nine words—you can forget everything else on this statement.

A. I am trying to—(examining).

I still say that if I did say that it should have been Kraus, not mentioned any names.

Q. Might this be true just as it is written, the exact nine words?

A. It may be true. I don't remember it though. I don't recall.

Q. Do you wish therefore to correct your testimony because I am quite certain that up until now you have not testified that those nine words might be true?

A. They might be true.

Q. Will you tell us what the nine words are so long as it is true, that these might be true?

[fol. 161] Mr. Sahn: Without reading it—just a moment. I object to the witness reading from any statement.

The Court: He has not been asked to read it. I will allow it.

Mr. Sahn: Well, the witness picks the statement up and starts reading from it, Judge.

Mr. McAuley: He has read it several times before.

Q. Do you know what those nine words are?

A. Yes.

Q. Now I don't believe up until this point in the trial you have testified on the record that those nine words might be true. Will you tell us what those nine words are?

A. May I look at the paper again?

The Court: He does not mean the nine words; he means the fact, the statement.

Q. The fact.

A. The fact is that I was waited on by M. Kraus.

Q. Is that what the statement says?

A. By Max Kraus.

Q. Now, would you mind repeating that?

A. That I was waited on by Max Kraus.

Q. That may be true?

A. That may be. I don't remember which, though.

Q. You are not certain?

A. I am not positive.

Q. You can't say positively that you were waited on by Max Kraus nor can you say positively that you were not waited on?

A. That is right. I am sworn in to tell the truth.



Mr. McAuley: That is all.

[fol. 162] Re-cross Examination.

By Mr. Sahn:

Q. Now I want to get one thing straightened out. You are not positive now whether Max Kraus waited on you or—

A. No, I am not.

Q. —or whether he did not wait on you?

A. That is right.

Q. But you are positive that the man who waited on you made out these tickets?

A. That is right.

Q. And the man who waited on you gave you these tickets?

A. That is right.

Mr. Sahn: That is all.

Re-direct examination.

By Mr. McAuley:

Q. You are not a handwriting expert, are you?

A. No, I am not.

Q. And of course if you only saw Max Kraus ten times in a year you would not know much about his handwriting, would you?

A. I wouldn't know.

Q. Then this might be his handwriting?

A. It may be.

Q. Or it may not?

A. That is right.

Q. Is that correct?

A. That is right.

Q. And you do not know where the man who gave you the bills actually wrote them out, do you?

A. Yes. I was there when he wrote them out.

Q. You were there?

A. Because I had to sign for it.

Q. You had to sign for it?

A. Yes.

Q. You saw him write out each and every item here in front of you?

A. That is right.

Q. You are positive of that?

A. The weights of it, yes.

[fol. 163] Q. The whole bill?

A. The whole bill, yes.

Q. You are positive this was not prepared by a book-keeper?

A. No, it wasn't prepared. It was made out right in front of me.

Q. Behind a desk?

A. No, right in the cooler.

Q. But you are positive you did not talk to Max Kraus, but to the person who made out this bill?

A. That is right.

Q. But in view of your former testimony it may be that these might have been made out by Max Kraus?

A. It may be.

Q. Is that correct?

A. Yes.

Q. They might have been made out by Max Kraus?

A. They might have been made out by Max Kraus.

Q. But you do not know?

A. I don't know.

Mr. McAuley: All right, that is all.

Re-cross examination.

By Mr. Sahn:

Q. Did you ever see Max Kraus write out a ticket for poultry to you?

A. No.

Q. Did you ever see Max Kraus write out a ticket for poultry to anybody?

A. I never saw Max Kraus make out any tickets.

Mr. Sahn: That is all.

Mr. McAuley: That is all, Mr. Moskowitz.

(Witness excused.)

Mr. McAuley: Will you remain here, please, Mr. Moskowitz?

The Witness: Outside?

Mr. McAuley: Yes.

Mr. Zweben.

[fol. 164] SAMUEL ZWEBEN, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. McAuley:

Q. Mr. Zweben, will you talk up so that Mr. Kraus's attorney can hear you. Talk a little bit more loudly than you can.

A. Well, I have a kind of a low voice.

Q. I know. That is why I asked you to talk up. You are a butcher by trade?

A. Yes, sir.

Q. And where is your place of business?

A. 1572 Second Avenue.

Q. 1572 Second Avenue?

A. 1572 Second Avenue.

Q. Can you give us an idea how long you have been in business?

A. For myself I have been in business for the last twelve years. Before that I have been with my father, since I am a child you might say.

Q. And where have you been buying your poultry for the last twelve years?

A. Well, I have been buying in some live poultry houses, the Atwater Live Poultry Market.

Q. Is that kosher poultry?

A. Kosher poultry.

Q. And where had you been buying the non-kosher poultry?

A. Lodell.

Q. From anybody else?

A. And recently I have been buying from Dorato & Cerutti.

Q. How long have you been buying poultry from Kraus Brothers?

A. Kraus Brothers I have been buying poultry say for the last eight or ten years—just once in a while; not steady, you know, because I use mostly kosher poultry.

Q. Where did you buy your poultry this week?

A. This week?

[fol. 165] Q. Yes.

A. I bought from a fellow by the name of Maloney, and I also bought in some kosher house, kosher poultry up in the Bronx.

Q. Where did you buy your poultry last week?

A. I bought a barrel of poultry from Maloney and I bought some kosher-killed poultry from a live poultry market.

Q. When did you last buy poultry from Kraus Brothers?

A. Well, I believe about three months or so ago—four months ago.

Q. You have not bought any poultry in the last four months, is that correct?

A. That is right.

Q. Now I show you Government's Exhibits 17 and 18 for identification, Mr. Zweben. Do you recognize those bills (handing witness)?

A. Yes, sir.

Q. You do?

A. Yes.

Q. Do you recall the transaction which they represent?

A. Is that different dates?

Q. No. I think it is the same date.

A. The same day?

Q. Do you recall those?

A. Yes. Two boxes of turkeys. Ten turkeys, grade A, 146 pounds at 45½ cents, and then I had two boxes of toms.

Q. Tom turkeys?

A. Grade A, one weighed 94 pounds and one 118 at 43½.

Q. And the other bill?

A. Four boxes of chicken skin.

Q. Chicken skin?

A. Chicken skin.

Q. And how much did you pay a pound for the chicken skin?

A. 30 cents.

Q. 100 pounds at 30 cents, is that right?

A. Yes.

Q. Will you tell us what you did that day in connection with these purchases?

A. Well, I believe it was—was it the 22nd—was that on—

[fol. 166] Q. November 22nd.

A. It was on a Thursday or a Wednesday.

Mr. McAuley: No objection to this, Mr. Sahn?

A. (Continued:) I think I took the whole thing in together to my place.

Q. Just a moment. I would like to show you these invoices. Maybe you can remember them better. I show you these two of November 24th, two days later. Do you recognize those (handing witness)?

A. Yes, two boxes of turkeys, premium hen turkeys, 207 pounds at 45½ cents.

Q. And the next?

A. And two boxes of toms, 171 pounds at 42 cents a pound.

Q. And the next?

A. Two barrels of chicken feet.

Q. Two barrels of chicken feet?

A. Yes, one is 106 and the other one 121 at 15 cents a pound.

Q. Do you recall these two transactions, one taking place on the 22nd of November and the other two days later, on the 24th?

A. Did that come out the 22nd, on a Wednesday?

Q. I don't know offhand.

A. Well, I remember the turkeys and the chicken skins. I took it in the same day I bought it—I believe that is so.

Q. Tell us what happened with reference to November 22nd. You went to Kraus's, is that right?

A. Yes.

Q. What happened? Tell us what happened, everything you remember that happened?

A. Well, I believe a couple of days before that I placed my order with Willie Kraus, who works for Kraus Brothers. I believe he is a nephew of Mr. Kraus.

Q. Yes.

A. He took my order. He told me there will be some turkeys in because turkeys were very scarce and I wanted [fol. 167] a few. Other houses, they didn't promise me anything. So Willie told me they are expecting some turkeys. I should give him my name and he is going to put me down for some turkeys. If the turkeys will come in every customer that buys there steadily will get some of their turkeys. Well, I have been a very steady customer, and he took me down because I buy turkeys every year. Every year I used to buy turkeys. Poultry I did not buy there. I bought wherever I have a chance but turkeys I used to get from them every year practically, so he put me down for the order.

Q. Then after you went down?

A. Then after I went down I had to wait. I waited all day long there.

Q. What did you see there? You were there all day long.

A. Well, I saw a lot of people outside and some people were inside for the turkeys.

Q. And what were they doing?

A. Well, they told me to wait outside, when my next will come they will call me in.

Q. In the meantime did you see what the butchers were doing as they left the place?

A. I saw them carrying out boxes of turkeys and some chicken feet, I believe it was.

Q. And that was going on all day long?

A. Well, during the time I was there, for a couple of hours.

Q. Did you see them carrying anything else out besides turkeys and chicken feet?

A. No, I don't think so.

Q. Did you see any gizzards?

A. They probably had a little bit of meat there they sold. Usually those days they don't sell much meat.

Q. Later that day you carried out some chicken skin, did you?

A. Yes.

[fol. 168] Q. Were you the only one, so far as you know, who carried out chicken skin that day?

A. As far as I know because I did not—

Q. All you saw were feet, is that right?

A. Yes.

Q. All right. Then you were waited on, is that right?

A. That is right.

Q. Tell us what happened.

A. Well, when I came inside they called my name and they said "Mr. Zweben, you are entitled—you are going to get several boxes of turkeys."

Q. Who said that to you?

A. I believe it was Willie Kraus.

Q. Willie Kraus?

A. Yes, and I went over to a Mr. Balter who was charging the books and he made out the ticket and he put down the weights of the turkeys and he asked me "How about

some chicken skin?" So I said, "All right, I will take some chicken skin."

Q. So you took it, is that right?

A. Yes, I did.

Q. Did you pay for it?

A. Well, I pay my bill weekly, the following week.

Q. What did you do with the chicken skin?

A. Well, I did not know what to do with it at first. I put it in the icebox.

Q. Why was that you did not know what to do with it at first?

A. Well, I never had chicken skins before.

Mr. Sahn: Just a moment, Mr. Witness. That is objected to as not being material and not competent.

The Court: I will allow it.

Mr. Sahn: As to what he did with it.

The Court: I will allow it.

Mr. Sahn: Exception.

[fol. 169] Q. Why did you say you did not know what to do with it at first, Mr. Zweben?

A. Well, I never sold chicken skin before, but I knew being there is a big demand for all kinds of meats and everything else, I figured maybe I will be able to sell it but I will wait and see what is going to happen after the holidays. I put it in the icebox.

Q. Do I understand you to say that you had never before purchased chicken skin?

A. No.

Q. On that date did you ask to buy chicken skin?

A. Yes.

Q. You did?

A. Yes.

Q. Well, how did you get the idea of chicken skin? You told me you saw nothing but feet carried out.

A. Well, maybe there was chicken feet but I believe the chicken feet was on it —

The Court: He wants to know if you asked for chicken feet or skin. You did not ask for chicken skin, did you?

The Witness: No. I was asked if I will take some chicken skin. He asked me if I could use some chicken skin and I said yes.



Q. All right. Now on that day, November 22nd, was Max Kraus there—Did you see Max Kraus?

A. I don't remember exactly but I think he was there.

Q. Do you know Max Kraus?

A. Yes, sir.

Q. Will you stand up and look all around the courtroom and see if you can point out—

A. Yes, this gentleman is Mr. Kraus (indicating).

Q. That is Mr. Kraus in the blue suit?

A. Yes.

Q. Is that correct?

A. Yes, sir.

[fol. 170] Q. Did you on that day, November 22nd—did you go inside the premises? Where did you wait around all day for your turkeys?

A. I waited in front of the place.

Q. What is that, an anteroom, a sitting room or what?

A. No, it is a big room like—the offices are in the same room there but it is much larger where people can walk in and wait.

Q. Are these seats? Can you sit down?

A. No.

Q. Well, did you stand up all day?

A. Well, for the hours I was there—I went away and came back. I had a lot of work to do before a holiday. I couldn't stand in one place too long.

Q. Where was this Willie Kraus when he said "your turn next," or whatever he said?

A. Well, he came out every once in a while and he came in and said my turn will be soon and I waited.

Q. He came out to this waiting room?

A. Yes.

Q. And you never went inside the premises beyond that waiting room?

A. Not until they called me.

Q. And when they called you where did you go?

A. I went into the icebox where they had the turkeys.

Q. Can you tell us where, just the location in that butcher shop you believe you saw Max Kraus that day? Was it the office, the waiting room or inside near the icebox?

Mr. Sahn: That is objected to, your Honor, on the ground that the District Attorney is questioning this witness about count 6 in the information 117-64 relating to an occurrence

on the 22nd day of November, which is an allegation against the corporation alone. This witness has two counts here. He is testifying to two counts.  
[fol. 171] The Court: Overruled.

Mr. Sahn: Exception.

Q. (Read.)

A. Well, I believe it was in the icebox. I am not positive but I think I saw Mr. Kraus there.

Q. Well, maybe it would help you to recall if you tried to recall if you said anything to him on that day or if he said anything to you.

A. No, Mr. Kraus never spoke to me or very seldom I speak to Mr. Kraus. As a rule I do the business with the people who work there. I know Mr. Kraus just from seeing him, that that is Mr. Kraus.

Q. I don't believe I asked you to give us a rough idea of the volume of business you did a year, your gross. How big a butcher shop?

A. I believe about \$85,000.

Q. \$85,000?

A. Yes.

Q. Now, I show you Government's Exhibits 19 and 20 for identification—

Mr. McAuley: There is no objection, I understand, by Mr. Sahn.

Mr. Sahn: No objection.

The Court: Very well.

Mr. McAuley: Therefore 17, 18, 19 and 20 may be marked in evidence.

(Government's Exhibits 17, 18, 19 and 20 for identification now received in evidence.)

Q. I show you Government's Exhibits 19 and 20, Mr. Zweben, the bills of two days later, November 24th. Will you tell us what happened on that date, two days later (handing witness)?

A. I believe it was about the same thing.

[fol. 172] Q. Well, you mean you waited all day?

A. I waited—well the next time I came down in the afternoon and I waited a couple of hours and I was waited on. I knew if I come in the morning I will have to wait all day. There were so many butchers waiting there.

Q. Who waited on you that day?

A. Well, when I came in it did not take very long. It took only a few minutes because I was very much in a hurry.

Q. I am not asking you that.

A. I remember I went over with the fellow who had charge. He asked me my name and address and I gave him my name and address and he marked me down. I believe Meyer was his first name—a salesman. He went over to the boxes and called out the weights of the boxes.

Q. Was he the same fellow who waited on you two days before?

A. I don't remember whether he waited on me two days before.

Q. Now see if you can remember.

A. It's kind of hard. It was, I believe, about six months ago.

Q. Well, how is it you remember that Meyer waited on you on the 24th?

A. Because I happened to see Meyer every day. Meyer waited on me today. I see him every day. He serves me with lamb.

Q. I thought you told us a while ago that you hadn't bought from Kraus in the last three or four months.

A. Poultry.

Q. Poultry?

A. Poultry; I mean by that chickens.

Q. I see. But you were there today?

A. I am there every day.

Q. You were at Kraus's today buying lamb?

A. That is right.

Q. And Meyer waited on you?

A. Meyer waits on me. He is in charge of the lamb department.

[fol. 173] Q. Was he then in charge of the turkey department?

A. Well, yes; that day before a holiday there isn't much meat to be pushed. Butchers don't buy meat, mostly poultry, and all help on the poultry.

Q. He was a lamb man who was temporarily transferred from the turkey desk, is that right?

A. Yes.

Q. Can you remember who waited on you on the 22nd?

A. I believe it was Meyer that called out the weights of the turkeys to Mr. Balter who was charging it to me.

Q. Now on the 24th, two days later, did you see Billy Kraus?

A. Billy Kraus?

Q. Isn't that the name you said before?

A. Billy Balter.

Q. Billy Balter. Well, didn't you mention another Kraus other than Max Kraus?

A. Willie Kraus you mean?

Q. Willie—oh, yes, I beg your pardon. Did you see Willie Kraus on the 24th?

A. Yes, I see him also practically every day. They are all in the same box. It is one big box where they have lamb, beef, poultry.

Q. By a "box" you mean an icebox?

A. A great-big icebox.

Q. You see them outside of that icebox?

A. Outside, inside. They are in and out. They do all the work.

Q. And you waited outside, is that right?

A. On that day you mean that I bought the poultry?

Q. Yes.

A. I waited outside for my next because there were so many people there they couldn't let everybody in, otherwise there would have been a riot, I believe.

Q. On the 24th did you see Max Kraus?

A. I don't remember whether it was the 24th or the 22nd, but I remember I saw Mr. Kraus at one time in the box. I don't remember that day; I can't tell you.

[fol. 174] Q. Did you have anything—

A. Maybe I did not but I think I did—I am not positive.

Q. Well, did you have anything to say to him?

A. No, sir, because I never speak to Mr. Kraus and he never speaks to me, because he is the owner of the place, the great big place, and there are plenty of people who take care of the place.

Q. You have been doing business, you say, with Kraus about eight years?

A. For about ten or twelve.

Q. And you are there every week, is that right?

A. Every day now. Even since about last year, since the war started and the meat shortage, we have to go every day to get a little meat for the next day, and the next day we haven't anything, and we have to go back again.

Q. Have you ever been introduced by any of the employees of Max Kraus & Brothers, to Max Kraus?

A. If I have been introduced?

Q. In the eight or ten years that you have been dealing there steadily has anyone introduced you to Mr. Kraus, Mr. Max Kraus?

A. No.

Q. And said "Meet Mr. Zweben"?

A. No, sir.

Q. That never happened?

A. I don't mean very much. I am only a small customer.

Q. And yet Max Kraus has not talked to you, is that correct?

A. That is right.

Q. Now I notice you got feet there on the 24th instead of skin?

A. Yes.

Q. How did that come about? Did you say you wanted chicken feet?

A. Well, I did not ask for it. He asked me if I could use some chicken feet and I said "All right I will take some chicken feet."

Q. On the 24th you were asked the same sort of question you had been asked on the 22nd, is that right?

A. That is right.

[fol. 175] Q. And what did you say?

A. I said, "Yes." I figured they do me a big favor by selling me turkeys and it is not more than right to take the chicken feet, even though I did not know whether I was going to sell them or not. I never bought chicken feet before.

Q. Do you recall who asked you on the 22nd if you would like to take some chicken skin, \$30 worth?

A. I don't think I can remember who asked me because there were some other fellows from the poultry department. Mr. Kraus has another poultry department recently, and they were over in the other house and I believe they were all in this box; being I don't buy poultry very much, only if it come to how much they have, so I don't think I know the names of everybody in the poultry department.

Q. Can you remember whether Kraus was there in the ice-box when you bought—was he there when you bought the skin on the 22nd or was it when you bought the feet on the 24th?

A. Well that I don't remember definitely.

Q. You can't?

A. No. I believe he was there because I see Mr. Kraus around there every once in a while. He comes down from the office, takes a walk and goes to the restaurant or he talks to some people outside.

Q. Goes in and out, is that right?

A. Not in the box, not in the icebox, no. I mean outside you can see Mr. Kraus.

Q. From the office out into the street and back again?

A. That is right. It is a separate entrance to the office.

Mr. McAuley: That is all—Just one more question.

Q. Mr. Zweben, did you take the chicken feet away from M. Kraus or did you leave them there?

A. I left them there.

[fol. 176] Q. Well, how did you come to leave—

A. I took them a couple of weeks after, about two weeks after.

Q. But on that day you were billed for them?

A. Yes.

Q. You did not take them with you?

A. No, sir.

Q. Were they rolled out to your truck—have you a truck?

A. No, I have a car.

Q. A little private car?

A. I can't take too much in the car. I figured the chicken feet is not important. It was the turkeys that I was after.

Q. Did anybody make an effort to put the chicken feet in your car?

A. Pardon me?

Q. Did anybody make an effort to put the chicken feet in your car?

A. No.

Q. Did you have a conversation with Max Kraus about whether you should take the chicken feet home or leave them there?

A. No, sir.

Q. Did Max Kraus see you leave the chicken feet there?

A. I don't believe so.

Q. Now what do you mean by "I don't believe so"?

A. Because Mr. Kraus is very seldom seen in the ice-box.

Q. But was he there that day?

A. I am not positive. I only think that I saw him there once, but I can't recall whether it was that particular day or the other day. I still can't say for sure when I mean.

Q. As far as your leaving the chicken feet there because you couldn't use them, did you ever tell any OPA investigator that Max Kraus was there and saw the whole transaction?

A. If I told that to any of the inspectors?

Q. Yes.

A. Maybe I did.

Q. Well, will you look at this piece of paper——

The Court: Well did you or didn't you? Sit up in that chair and answer the question.

[fol. 177] The Witness: Well, it is quite some time ago. Maybe this will remind me.

Q. Yes. Will you please read from here on (indicating), or from here on (indicating), down to here (indicating)—just about six lines.

A. "I also got 4"——

The Court: Don't read it out loud.

Q. Don't read it out loud. Read it to yourself.

A. (After reading) Pardon me, can you tell me what this says (indicating), this thing here—is that "boxes"?

Q. "Boxes," yes.

(The witness examines further.)

Q. Did you read those six lines?

A. I read—the chicken feet is about the same as that.

Q. Well, did you read this sentence (indicating)?

A. Yes.

Q. Does that refresh your recollection so that you can answer the question I just addressed to you a while ago?

A. Well, if it says so here I believe it is so. I must have seen Mr. Kraus in there. It says in the statement, although I never read the bottom of the statement when I signed it.

The Court: Well, did you see him or not?

The Witness: Yes, sir.

Q. This is your signature?

A. Yes, sir.



Mr. McAuley: That is all.

[fol. 178] Cross-examination.

By Mr. Sahn:

Q. You weren't compelled to take these chicken feet?

A. No, sir.

Q. Nobody demanded that you take them?

A. No, sir.

Q. You weren't required to take them?

A. No, sir.

Q. You did not speak to Max Kraus?

A. No, sir.

Mr. Sahn: That is all.

Redirect examination.

By Mr. McAuley:

Q. At that time when you went for your turkeys did anybody in Kraus's ever offer to sell you turkeys alone without also giving you a bill for chicken skin or feet?

A. Pardon me? Would you mind repeating it?

Q. Were you ever given the opportunity to buy turkeys and turkeys only?

A. Ever. You mean not that particular date?

Q. Right at this time, at this time?

A. Well, I don't think we spoke about business before that with everybody. All I asked is if I will have a chance to get some turkeys for the holidays.

Q. And whenever you were asked that and you were told, you were also given a bill for some chicken feet or some chicken skin, is that right?

A. Yes.

Q. And you had enough brains to see the spot you were on, you had to buy them?

Mr. Sahn: Oh, that is objected to.

The Court: Sustained.

Mr. McAuley: That is all.

[fol. 179] Recross-examination.

By Mr. Sahn:

Q. When you left the chicken feet there you left it because you said you did not have room enough in your car?

A. That is right, that is one reason.

Q. And you came back and got the chicken feet later?

A. Yes, I got two weeks after that.

The Court: You got the chicken feet two weeks after that?

The Witness: Yes. I decided to take them in. I figured I could sell them.

Mr. Sahn: That is all.

Redirect examination.

By Mr. McAuley:

Q. Do you know where the chicken feet were kept in the box where you left them?

A. I believe they put them in some storage house.

Q. Did you actually on the 24th see the chicken feet?

A. Yes, sir.

Q. You saw them?

A. Yes, sir.

Q. Now, when you got them what did you do with them?

A. Well, I took in one barrel at once. I took it in one week and I made—I displayed it on the showcase and marked them at 20 cents a pound and 15, I believe.

Q. Yes.

A. So I sold some of it. The next day it did not move so fast so I marked them 15 cents, then I believe 10 cents, and some of it I gave away to the customers. Some people buy soup meat and they asked for chicken feet which makes a good soup, and I gave it to them for nothing.

Mr. McAuley: That is all.

(Witness excused.)

The Court: Five minutes after two.

(Recess until 2:05 P. M.)

[fol. 180]

2:05 P. M.

Mr. McAuley: Mr. Newlon.

PAUL J. NEWTON, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. McAuley:

Q. Mr. Newton, what is your occupation?

A. I am an attorney employed at the OPA.

Q. And to what division are you attached?

A. I am attached to the Price Division in the Regional Office in New York.

Q. And how long have you been attached to the Price Division?

A. Since February 1, 1943.

Q. February 1, 1943?

A. Yes.

Q. In connection with your work is it part of your duties to familiarize yourself with the OPA price regulations with reference to poultry?

A. It is.

Q. Chickens and turkeys particularly?

A. Yes, sir.

Q. Are you familiar with the OPA regulations and the OPA prices with reference to the ceiling price on chickens and turkeys as they existed between November 4th and November 24th, 1943?

A. Yes.

Q. Will you tell us what the ceiling prices were on chickens and turkeys during that period in 1943 to the wholesaler, that is, wholesaler to retailer?

A. For an undelivered sale of light turkeys to a retailer by a wholesaler the ceiling was 45½ cents per pound. For medium weight live turkeys it was two cents less or 43½ cents. For heavy turkeys young, it was 42 cents. For old turkeys, light, it was 43½; for medium weight, all turkeys, it was 41½; and for heavy old turkeys it was 40 cents.

[fol. 181] I don't know what chickens you want me to tell you about. There are quite a lot of prices.

Q. About chickens? Well tell us, if you know.

The Court: He says there are a lot of them. Do you want any particular grade?

Q. I believe we have testimony that we have grade A chickens sold in this case.

A. Well, I would like to add to the turkey prices that those prices are for grade A dressed turkeys.

Now, on dressed broilers, fryers and roasters, chickens, the prices—I will have to refer to the regulation on that.

Q. Will you give me the price of grade A broilers?

A. (After examining) Grade A broilers, 37½ cents.

Q. And grade A fryers?

A. The same.

Q. And grade A roasters?

A. 37½.

Q. Did you give me before any price of 45 cents a pound on any type of turkey?

A. No. I gave you 45½.

Q. 45½ cents?

A. Yes, for light young turkeys.

Q. Any distinction there as to whether they were hen turkeys or tom turkeys?

A. No, there is no distinction; just young. The distinction is between old and young and according to the weight and grade.

Q. So that it is correct that the prices of turkey of the type that you described in that period ranged between 40 cents and 45½ cents?

A. That is correct.

Q. Is that right?

A. Yes, sir.

Q. That was the ceiling at that date?

A. On grade A.

Q. Yes, and 37½ cents was the ceiling on the type of chicken you described?

A. Yes, sir.

Mr. McAuley: That is all.

The Court: You do not question any of these prices, do you?

[Vol. 182] Mr. Sahn: No, I do not question the prices that the witness gave. I am just looking through the exhibits to see the prices on the tickets.

The Court: Well do you want to cross examine?

Mr. Sahn: I do not think so. I just want to get through looking at these tickets. (Examining.)

No cross.

(Witness excused.)

Mr. McAuley: Your Honor, save for one witness, Mr. Katz named in the sixth count of the information against the corporation and Max Kraus, the government is ready to rest. I am informed that Mr. Katz was served with a subpoena not personally but at his place of business yesterday and I am further informed that he called—which subpoena read yesterday at 10:00 A. M., and that he called at 9:00 o'clock this morning. I did not know of such call. Not being able to locate me, I am informed that he went away for the day. I have investigators trying to get in touch with him at the present moment. If we succeed in finding him today or tomorrow I would like to present him.

The Court: Well, I am not going to hold the case open for him.

Mr. McAuley: I know. The government is then ready to rest.

Mr. Sahn: I should like to address some motions to the informations.

The Court: Do you wish the jury excused?

Mr. Sahn: Yes.

The Court: I will excuse you, members of the jury.

(Whereupon the jury was excused at 2:15 P. M.)

[fol. 183]

#### MOTIONS TO DISMISS

Mr. Sahn: Addressing myself firstly to information No. 117-64, which is the information against the individual defendant as well as the corporate defendant, I move generally to dismiss every count as against the individual defendant Max Kraus on the ground that these counts are all substantive and there has not been a single iota of testimony given by any witness in this proceeding that Max Kraus made, consummated, took part in or did anything in connection with any sale covered by any one of the counts in this information.

The Court: Denied.

Mr. Sahn: Exception.

I further move to dismiss all of the counts in both informations generally on the ground that the informations fail to set out a cause of action against the defendants. The information refers to Section 1429.5 of Maximum Price Regulation No. 269, which is specifically the evasion clause. That, supposedly, under the reading of the information, is

the only regulation, the only law that the defendants were alleged to have violated. This reads as follows:

"Price limitations set forth in this *devised* Maximum Price Regulation No. 269, shall not be evaded whether by direct or indirect methods, in connection with any offer, solicitation, agreement, sale, delivery, purchase or receipt of, or relating to, the commodities prices of which are herein regulated, alone or in conjunction with any other commodity, or by way of commission, service, transportation, or other charge, or discount, premium, or other privilege or other trade understanding or otherwise."

[fol. 184] I read this section in its entirety to your Honor because it is interesting to note that in other maximum price regulations where the Administrator so desired and where his intention was so to do the words "tie in sales" were specifically mentioned and included in the evasion clause. There is nothing in the clause or in the regulation itself which prevents or prohibits the sale of gizzards, the sale of chicken skin, the sale of chicken feet or the sale of any part of a whole chicken. If the Administrator had intended to include tie in sales I submit that because of the inclusion of the words "tie in agreements" in every other regulation, where there might be agreements, that because of the exclusion of those words in this regulation that no cause of action has been stated in the information.

The Court: Denied.

Mr. Sahn: Moving specifically now as to count 1 in information No. 117-64, I move to dismiss this count against the defendant Max Kraus and against the defendant M. Kraus & Brothers, Inc. specifically on the ground that the information alleges that a sale was made on November 24th to Harry Moskowitz of 875 pounds of poultry, and that we compelled and required and demanded that the said Harry Moskowitz purchase that commodity and to purchase another commodity, to-wit, chicken feet. The testimony of Harry Moskowitz is or was that Harry Moskowitz did not purchase this poultry. This poultry was purchased by Phil Moskowitz. The tickets are made out to Phil Moskowitz. The information must contain specific data as to the nature [fol. 185] of the sale, the type of the sale, the person to whom the sale was made and the date of the sale. I submit that the proof does not conform to the information and this count has to be dismissed against both parties.

The Court: That is denied.

Mr. Sahn: Exception.

I move to dismiss the second count, the third count, the fourth count of the information 117-64, they being the counts wherein Max Braverman allegedly was compelled to purchase chicken feet or gizzards. I move to dismiss such counts as against the individual defendant on the specific ground that the individual defendant was not named in the testimony of this witness; that there is no testimony in the entire record tying up the defendant Max Kraus with the sale in question; that, on the other hand, the testimony specifically denies any agreements, any talk, any relationship whatsoever with the individual defendant.

The Court: Denied.

Mr. Sahn: Exception.

I move to dismiss the fifth count of the information on the ground that no evidence at all has been adduced at this trial.

The Court: Is that the missing man?

Mr. McAuley: Yes, your Honor. The government will move to dismiss that count.

The Court: I grant the application.

Mr. Sahn: I move to dismiss the sixth count of the information on the ground that there has been no evidence tying up the individual defendant Max Kraus with the sale [fol. 186] or any part of the sale, and, on the other hand, the witness specifically testified that he was not compelled nor was any demand made of him, and that he was not required to take any commodity as a condition of the sale of the poultry to him.

The Court: Denied.

Mr. Sahn: Exception.

Referring now to information 117965, I move to dismiss count 1 specifically on the ground that the information alleges a sale to one Harry Mandel of 14 pounds of gizzards and 421 pounds of poultry. The testimony shows that Harry Mandel never purchased any poultry. The witness himself purchased the poultry for a corporation and the witness was one A. Mandel. The information is defective in that it fails to set out specifically the full and exact nature and detail of the transaction.

The Court: Denied.

Mr. Sahn: Exception.



I move to dismiss the second count of this information referring to the same party, upon the same grounds.

The Court: Denied.

Mr. Sahn: Exception.

I move to dismiss the third count of this information on the ground that the witness specifically testified that he was not compelled to, that no demand was made of him and he was not required to accept any commodity as a condition of the sale to him of another commodity.

The Court: Denied.

Mr. Sahn: Exception.

I move to dismiss the fourth count on the ground that the witness therein, Manuel Cuet, testified that he was not [fol. 187] compelled to accept any commodity as a condition to the sale of another commodity.

The Court: Denied.

Mr. Sahn: Exception.

I move to dismiss the fifth count on the same grounds, to-wit, that the witness testified there was no compulsion nor demand upon him.

The Court: Denied.

Mr. Sahn: Exception.

I move to dismiss the sixth count of this information on the ground that the witness testified that there was no compulsion upon him to accept chicken feet as a condition of the sale to him of dressed poultry.

The Court: Denied.

Mr. Sahn: Exception.

As I understand it then, for the purpose of clearing my files here, all of these motions to dismiss against both of these defendants as to each and every count have been denied with the exception of count 5 of the information 117-64, which has been granted.

The Court: Are you going to put in any evidence before I call the jury in?

Mr. Sahn: I am going to put in evidence.

The Court: All right, call the jury in.

(Whereupon the jury returned at 2:30 P. M.)

Mr. Sahn: Mr. Bungard.

[fol. 188] DAVID M. BUNGARD, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sahn:

- Q. Mr. Bungard, what business are you in?  
 A. Retail butcher business.  
 Q. How long have you been a retail butcher?  
 A. About eight months.  
 Q. And prior to that time what business were you in?  
 A. The wholesale butcher business.  
 Q. And where do you conduct your retail butcher business establishment?  
 A. At 379 East 138th Street, Bronx County.  
 Q. How long were you a wholesale butcher, Mr. Bungard?  
 A. Approximately 23 years.  
 Q. And where did you conduct that establishment?  
 A. At 655 Brook Avenue, Bronx.  
 Q. Now, do you know the defendant M. Kraus & Brothers, Inc.?  
 A. I do, sir.  
 Q. Have you dealt with that defendant since you have become a retail butcher?  
 A. I have, sir.  
 Q. Did you know that *the* defendant prior to the time you became a retail butcher?  
 A. I did.  
 Q. Have you bought poultry from that defendant?  
 A. I did.  
 Q. Have you bought chicken feet from that defendant?  
 A. I did.  
 Q. Have you bought chicken skin from that defendant?  
 A. I did not.  
 Q. Can you tell us whether the defendant M. Kraus & Brothers, Inc. through any of their salesmen ever offered to sell you chicken skins?  
 A. Yes.  
 Q. Did you buy it?  
 A. I did not.

[fol. 189] Q. Were you able to get poultry without the chicken skins?

A. I was, sir.

The Court: What does this prove?

Mr. McAuley: Where and when was this?

Mr. Sahn: I will come to that.

Q. When was that?

The Court: I am not interested in when it was. I want to know why it is, why are you putting this testimony in? What is it supposed to prove?

Mr. Sahn: I intend putting in testimony here to show that there is and has been a demand for chicken skins, chicken feet, gizzards, that they are customarily sold; that they are bought; that they are dealt and traded in. The government has inferred through all of its testimony that chicken skin and chicken feet are so much waste, that they are dumped; that they are not used and they have opened up the door to this type of testimony.

The Court: Well, I will sustain an objection to all of this if it is stated in the record.

Mr. McAuley: I will object to it.

Q. Do you sell chicken feet in your stores?

A. I do.

Q. Do you openly display chicken feet in your stores?

A. I do.

Mr. McAuley: I will object to that question again.

The Court: Sustained.

Mr. Sahn: Again I call to your Honor's attention to the fact that similar testimony from the opposite viewpoint, that chicken feet are not in demand, was offered and allowed in evidence.

[fol. 190] The Court: I do not think the government ever put in issue whether or not there was a demand for chicken feet. There has been a demand for chicken feet for some purpose or other. The only thing we are concerned with is whether or not the witnesses who testified purchased chicken feet to meet a demand in their stores.

Mr. Sahn: I do not think that is the question in the information however, Judge.

The Court: Well, maybe you don't think so but that is going to be the question in this case. Now I have sustained

an objection to this kind of testimony. You have an exception in the record, and there is no use wasting any time about it.

Mr. Sahn: I take my exception.

Q: Were you ever compelled to buy chicken skins of the defendant?

A. No, sir.

Mr. McAuley: I object to that question.

The Court: Sustained.

Mr. McAuley: Not charged in the information.

Q: Were you ever compelled to buy chicken feet?

Mr. McAuley: I object to that question.

The Court: Sustained.

Mr. Sahn: That is all.

Mr. McAuley: That is all.

(Witness excused.)

Mr. Sahn: If your Honor please, I should like a ruling at this time, before I take the time of this court in putting on any number of witnesses who would testify to a similar condition in their neighborhood, as to their demand in [fol. 191] those particular neighborhoods for such items as chicken feet, chicken skin, gizzards and the like. I should like to know whether your Honor's ruling is going to be the same in all those cases, in all those instances, and whether it is necessary for me to put all these men on the stand and question them all individually and have the same objections.

The Court: It is not only unnecessary but I direct you not to do it. The meaning of my ruling is perfectly clear. It is entirely unnecessary to repeat it.

Mr. Sahn: Mr. Reiner.

BENJAMIN W. REINER, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sahn:

Q. What business are you in, Mr. Reiner?

A. Retail butcher business.

Q. How long have you been engaged in that business?

A. Approximately four years.

Q. Now, where is your store located?

A. 1103 Lexington Avenue, New York.

Q. Have you dealt with the defendant M. Kraus & Brothers, Inc.?

A. Yes.

Q. How long have you dealt with that firm?

A. Approximately a year.

Q. During the past year have you purchased any chicken feet from them?

[fol. 192] Mr. McAuley: I object to that question.

The Court: Objection sustained.

Did you understand what I said?

Mr. Sahn: You said "sustained." I understood that your rulings were going to be the same in all of these witnesses that I put on the stand, yes.

The Court: Well, didn't you hear me tell you that I direct you not to put them on the stand; that I have given you an exception to the ruling to any such testimony?

Mr. Sahn: I did not hear that portion of your statement, I am sorry. Now that I understand you perfectly on that, I will not put any other witnesses on the stand to testify to that effect.

Do you want to cross-examine?

Mr. McAuley: No.

Mr. Sahn: Step down.

(Witness excused.)

Mr. Sahn: Mr. Kraus.

MAX KRAUS, a defendant, being called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sahn:

Q. Mr. Kraus, how old are you?

A. Sixty-five.

Q. And you are a member of M. Kraus & Brothers, Inc.?

A. Yes, sir.

Q. How long have you been in the meat and poultry business?

A. Thirty-seven years.

Q. How long is M. Kraus & Brothers, Inc. in business?

A. About twenty years.

[fol. 193] Q. Who is associated with you in that place?

A. My brother.

Q. Sir?

A. My brother.

Q. Your sons associated with you?

A. The oldest son, Jerome Kraus.

Q. Jerome Kraus?

A. Yes.

Q. Is he in business with you today?

A. Yes, sir.

Q. Is he active today in business?

A. At present he is in the army.

Q. I see. Where is your place of business located?

A. One place is on 20 Tenth Avenue, and one is 410 West 14th Street.

Q. Just what is your establishment at 20 Tenth Avenue? Describe it physically?

A. At 20 Tenth Avenue we handle all kinds of meats, provisions and poultry which comes in in boxes or by railroad.

Q. And what do you handle at 14th Street?

A. All stuff that comes in by trucks.

Q. And where is the majority of your poultry handled, at 14th Street or Tenth Avenue?

A. At 14th Street.

Q. Because the poultry comes in by barrel and by truck?

A. That is right.

Q. And that type of poultry is handled at 14th Street?

A. Yes.

Q. Do you have a manager at that 14th Street branch?

A. Yes, sir.

Q. What is his name?

A. Nathan Lotto.

Q. And do you have a manager at your Tenth Avenue branch?

A. Yes, sir.

Q. Do you have one manager there or do you have certain departments?

A. We have a sales manager. His name is William Harriss.

Q. And he generally is in charge of all sales of meats and provisions?

A. That is right.

[fol. 194] Q. And do you have a separate lamb department?

A. That is right.

Q. Do you have a man in charge of that department?

A. That is right.

Q. Do you have a separate beef department?

A. That is right.

Q. You have a man in charge of that department?

A. That is right.

Q. Now these men are used interchangeably during holiday seasons, Mr. Kraus?

A. Yes, sir.

Q. That is, your beef man will sell turkeys or your turkey man will sell beef?

A. That is right.

Q. Dependent upon the particular season?

A. That is right.

Q. Will you tell us what your principal duties, your duties were in and about the month of November and December, 1943?

A. Well, I have always been in the office and looking after drafts to be paid; sometimes negotiate some deals and other matters which come up of importance. That's all.

Q. Your office is not located on the ground floor of this building, is it?

A. No, sir.

Q. Your office is up above on the first floor?

A. That is right.

Q. It is entirely separate and distinct from the selling floor?

A. Our entire office is on the first floor. There are four offices.

Q. So that no person who comes down to buy poultry or meats comes into contact with you or with the rest of the administrative force?

A. Not at all.

Q. Now I understand that you also are importing?

A. Yes, sir.

Q. And what are your duties in connection with imports?

A. The same thing as in everything else.



[fol. 195] Q. Can you tell us about how much time you spend in the office as against how much time you spend on the floor?

A. My most of the time is spent in the office. I go to through the floors, I go through the plant to see and ask the salesmen what they received, how things are moving and how things are selling. Then I go up in my office and I stay there from practically eight o'clock till five, six or seven o'clock at night.

Q. And very little time is spent on the floor of the building itself?

A. Very—none at all.

Q. Do you actively sell meats? Do you go on the stand and sell meats?

A. I haven't sold anything in twenty years.

Q. Do you sell poultry?

A. No, none at all.

Q. Did you sell any poultry, chicken feet, chicken skins, gizzards, livers, in or about the month of November, 1943?

A. I did not, sir.

Q. In connection with poultry were you ever invited to attend any conferences by the Office of Price Administration with regard to the regulatory features of the regulation?

A. Yes, I was.

Q. Tell me the first time you were so invited?

A. It was on the 23rd of February, 1943.

Q. And where did you go?

A. To Washington.

Q. And how many days did you spend there?

A. Three days.

Q. Was that a local hearing comprised of New York dealers only or was it a national hearing?

A. It was national.

Q. And you were represented on this national board?

A. That is right.

Q. Who appointed you?

A. From the Association.

Q. What association?

A. The American Meat Association.

[fol. 196] Q. American Meat Association?

A. Yes.

Q. And you were the only men representing New York on that board?

A. Yes, sir.

Q. When is the next time you served on an OPA Administrative board?

The Court: He has not served yet on any OPA. I do know yet what this committee is that he has testified about. What has it got to do with this case? Supposing he was the Price Administrator himself; what has that got to do with this case?

Mr. Sahn: I believe I can introduce any testimony along a line which would show that this witness is of that type of character and cannot and will not engage in the practices set forth in the information.

The Court: Well if you have any such information that he can not and will not, that will be all right, but I again ask you, what does this testimony have to do with it?

Mr. Sahn: Well, all as to the reputation of the witness and his character at this time.

The Court: I will allow it. Go ahead.

Q. I show you this telegram and ask you—or let me ask you this, do you remember receiving a telegram from Chester Davis and Prentice Brown?

A. Yes, sir.

Q. Do you recall at this time what was in that telegram?

A. I was asked to attend or rather to be appointed to the War Board meetings from the packers.

Q. And did you attend that meeting?

A. I attended several meetings.

Q. I show you this telegram and ask you whether that was the telegram you received (handing witness)?

A. Yes, sir.

[fol. 197] Mr. Sahn: I offer it in evidence.

Mr. McAuley: No objection.

(Marked Defendant's Exhibit A.)

Q. You sold chicken feet in your place of business?

A. I did.

Q. There was chicken feet sold in your place?

A. Yes, sir.

Q. And there was chicken skins sold?

A. Yes, sir.

Q. And there were chicken and turkey gizzards?

A. Yes, sir, and turkey hearts.

Q. And all sorts of poultry parts, is that right?

A. That is right.

Q. Did you buy poultry parts?

A. I did.

Q. And you sold the poultry parts that you bought?

A. When you say "poultry parts" what do you mean?

Q. Well, did you buy gizzards?

A. Yes, sir.

Q. And you sold gizzards?

A. Yes, sir.

Q. You bought hearts and you sold hearts?

A. Yes, sir.

Q. You processed chicken feet yourself?

A. That is right.

Q. Did you ever go up to the Office of Price Administration and show to any enforcement attorney there bills for such chicken parts?

A. I did.

Q. I show you this bill and ask you whether this was one of the bills that you showed to an OPA enforcement official (handing witness)?

A. Yes, sir.

Q. Do you recall whom you showed that bill to?

A. I do.

Q. To whom?

A. To Mr. Schmalholz.

Mr. Sahn: I offer it in evidence.

Mr. McAuley: I object to all parts of it except—

The Court: Sustained.

[fol. 198] Q. Did you tell Mr. Schmalholz that you were buying chicken wing tips?

A. Yes, sir.

Q. And did he say there was any objection to it on the part of the Office of Price Administration?

A. None whatsoever.

Q. Did you tell him that you were buying chicken skin?

A. Yes, sir.

Q. Did he object to that?

A. No, sir.

Q. He did not object to the purchase or sale of any chicken parts?

A. Not at all.

Q. You advised him that you were buying and selling those?

A. That is right.

Q. Now, do you know the witness Harry Moskowitz?

A. Yes, I do.

Q. Do you know his father, Phil Moskowitz?

A. Very well.

Q. Did you sell Harry Moskowitz or Phil Moskowitz any turkeys and chicken feet on November 24, 1943?

A. I did not sell anything.

Q. Are you sure that you did not sell any turkeys or chicken feet to Harry and Phil Moskowitz?

A. I hadn't sold anything in over twenty years—not a pound of stuff of any kind.

Q. Did you speak to Harry Moskowitz, if you can recall on November 24th?

A. I did not, sir.

Q. Did you see Phil Moskowitz on November 24th?

A. I did not, sir.

Q. Did you tell Harry Moskowitz that before he could get 875 pounds of turkeys that he must first buy 427 pounds of chicken feet?

A. I haven't talked to him at all.

Q. So you did not tell that to him?

A. No.

Q. Do you remember seeing Harry Moskowitz that day?

A. I haven't seen him.

[fol. 199] Q. Now, the turkeys on November 24th were sold at the Tenth Avenue place?

A. That is right.

Q. Will you tell the Court and jury why the turkeys were sold at Tenth Avenue that day rather than 14th Street?

A. Because they come in in cars. They came from Denver, Colorado, and all cars which come in by freight come into our siding on 20 Tenth Avenue, because otherwise we would have to cart them from the 33rd Street yards and pay extra cartage on them.

Q. So that from the standpoint of economics and practical business, as long as you have the siding on Tenth Avenue you handled all freight turkeys on Tenth Avenue?

A. That is right—not grade A; all turkeys that come from the West in railroad cars are unloaded on 20 Tenth Avenue.

Q. I said freight turkeys?

A. Freight, that is right.

Q. Now, do you know the witness Max Braverman?

A. Yes, I do.

Q. How long have you dealt with Max Braverman?

A. I think for the last three or four years.

Q. Did you sell Max Braverman any chickens or any turkeys on November 24th?

A. I don't sell anything.

Q. Mr. Kraus, answer my question.

A. Pardon me, I did not.

Q. Did you sell him any chicken feet on November 24th?

A. I did not.

Q. Did you sell him any gizzards on November 24th?

A. I did not.

Q. Did you tell him that he could not get any chickens or turkeys unless he also took feet or gizzards?

A. I haven't talked to the man.

Q. You did not see him on November 24th?

A. No, sir.

Q. Now do you know the witness Sam Zweben?

A. Yes.

[fol. 200] Q. Did you see Sam Zweben on November 24th?

A. I did not, sir.

Q. Did you sell Sam Zweben 378 pounds of turkeys and 226 pounds of chicken feet on November 24th?

A. I did not, sir.

Q. Did you sell him anything on November 24th?

A. I did not, sir.

Q. Did you speak to him on November 24th?

A. I did not, sir.

Q. Did you speak to any buyer in connection with the sale and delivery of turkeys, chickens, chicken feet or any poultry products on November 24th?

A. I did not, sir.

Q. Do you recall at this time what your activities were that day?

A. You see, the cars are unloaded from the office—to get the men together—get Mr. Harriss up in my office and I told him when the car will be in and when the car will be on our siding and to see that they unload the car and do the best they can to satisfy everybody.

Q. And when did that car arrive, do you remember?

A. She arrived sometimes in the morning, I believe between 8:30 and 9:00 o'clock.

Q. And where?

A. At the 33rd Street yards.

Q. At the 33rd Street yards of the New York Central Railroad?

A. That is right.

Q. And when did it arrive at your place at Tenth Avenue?

A. I believe between 2:00 and 2:30.

Q. Were you in the office or downstairs on the floor when the turkeys arrived?

A. I went down about 3:00 o'clock and asked the boys if the car is in, if they are unloading, and they told me yes. I stood around a while and then I went back to my office.

[fol. 201] Q. Well, what do you mean by "a while"? Was it 10 minutes?

A. Oh, perhaps 20 minutes, 30 minutes.

Q. And during the time that you stayed there you did not make any sales to any customers?

A. I did not, sir.

Q. I show you these two papers marked Government's Exhibit 14 and Government's Exhibit 15, being two charge tickets made out to Phil Moskowitz, and ask you whether those tickets were made out by you (handing witness)?

A. No, sir.

Q. Are you sure of that?

A. Positive.

Q. Do you ever make our charge tickets?

A. No, sir.

Q. Did you make out any charge tickets on November 24th?

A. No, sir.

Q. Now do you know the witness Abraham Mandel?

A. Yes.

Q. Did you sell him any chickens?

A. I did not, sir.

Q. On November 22?

A. I did not.

Q. Did you sell him anything on November 22?

A. No, sir.

Q. Do you know Cuet?

A. Yes, sir.

Q. Did you sell him anything on November 22?

A. No, sir.

Q. Did you sell Mandel anything on November 4 or November 10, 1943?

A. No, sir.

Q. Did you have any conversation with Mandel?

A. Once in my office.

Q. How long ago?

A. It was, I believe, last March, when he was in trouble.

Q. A year ago last March?

A. That is right.

Q. After he was convicted and got six months' jail sentence?

A. That is right.

Q. He came to see you?

A. That is right.

[fol. 202] Q. Tell us that conversation.

A. We refused to sell him any stuff, and this Mandel which was here a witness and his father Harry came up in my office and asked me to see that they should get some poultry or some lamb meat, and I told them, I said to Harry, to his father, I said, "Harry, I am rather surprised to what you got yourself in and I would rather not do any business with you," and he started in to plead with me and he said, "Would you please call up Mr. Lotto and try to give us a little poultry?" Poultry was very scarce and I told him, "We will do the best we can." I was going to speak to Mr. Lotto to give him some poultry. That's all I seen of the man.

Q. And you never spoke to Harry Mandel after that?

A. I haven't seen Harry Mandel since; I understand after that that he was a very sick man and did not attend to business.

Q. Did you ever speak to Abe Mandel after that?

A. He came up in the office again, I believe it was about some time in April, the first part of April, and told me that Mr. Lotto refused to give him any stuff. I said, "What is the matter?" He says, "Nothing is the matter," but he said "I don't know; Nathan tell me he is not getting enough stuff in to distribute it between the trade." I said, "I am going to speak to Nathan," and he thanked me and walked away.

Q. And that is the last time—

A. That is right.

Q. —you spoke to Abraham Mandel?

A. To this young man who was here.

Q. The man who testified?

A. That is right.



Q. That was April of 1943?

A. That is right.

Q. Coming back to November 24th you said you were on the stand there for about 15 minutes. Did you notice [fol. 203] whether there were any customers in the refrigerator?

A. All the customers were outside.

Q. Were there any customers in the refrigerator?

A. Only the ones which we called in to get their poultry.

Q. That is right. So when the poultry was ready for the customer he went into the refrigerator?

A. That is right.

Q. Under normal circumstances when you were not rushed, when there is no holiday period, do you ever deny access to the refrigerator to any customer?

A. No, sir.

Q. So that if Mr. Mandel testified that he couldn't get into the refrigerator on November 4th and November 10th he was not telling the truth?

A. Positively not.

Q. Did you ever sell any poultry in November or December of last year to George Kuenzlen?

A. No, sir.

Q. Or to Julius Klein?

A. No, sir.

Q. Do you remember having a talk with someone in the Office of Price Administration about these sales which are covered by these government's exhibits here, about which the witness testified to this morning and yesterday—about the sale of chicken feet and gizzards and chicken skin?

A. I do.

Q. Can you tell us when you had that conversation?

A. I believe that was sometime in January.

Q. January of 1944?

A. 1944, yes, sir.

Q. At that time no information had been filed against you?

A. Not yet.

Q. You did not know any information was going to be filed against you, did you?

A. No, sir.

Q. With whom did you have the conversation?

A. With Mr. Schmalholz.

Q. Where?

A. At the office of the Empire State Building.

[fol. 204] Q. That is the Office of Price Administration?

A. That is right.

Q. Suppose you tell us the conversation. What did you say to him and what did he say to you?

A. Well, prior to that—you want me to state the entire facts, Mr. Sahn?

Q. Certainly, Mr. Kraus.

A. If the Court will permit me I will state the case—I mean how the thing came about.

Q. When did you first speak to him about this? Was it in December?

A. I first spoke to Mr. Schmalholz in December. That was on the 3rd of December.

Q. All right. Did you speak to him on the telephone?

A. On the 1st of December—on the telephone. On the 1st of December two OPA men walked into my office about a quarter to five when everybody was gone and I was left with one man, and they asked me that they would like to look over my sales on turkeys. I say “If Mr. Bloomer, our controller, wants to stay here I will be glad and show them to you.” I believe there was one gentleman by the name of Frankel and another stout gentleman—I don’t remember his name. We went into the back office and we gave them all the sales what we have made for that day. In fact they asked me if I am going home would I take them to the station with the car, which I did.

About the 3rd of December, which was on a Friday, I had quite a few calls from our customers that the investigators from the OPA are coming in to them threatening them, looking over the bills, what they ought to say.

Mr. McAuley: I thought we were going to confine this to the conversation with Mr. Schmalholz?

The Witness: I have asked the Court—

The Court: Are you objecting?

[fol. 205] Mr. McAuley: I object to this.

The Court: Sustained.

Q. After December 3rd when you found out this information from your customers, what did you do?

A. Mr. Sahn, if you will permit me, I had a conversation with Mr. Schmalholz on the 3rd of December.

Q. All right. What was that conversation? Tell it to us.

A. I called Mr. Schmalholz up and I asked him "What are you doing?" I said, "If you are sending out men to blackmail me, if you want any information, you send somebody right down in my office and I'll give you anything you want." And he said to me, "Do you want me to do that?" And I said, "Definitely." And Mr. Schmalholz sent a man down and we gave him whatever he asked—in fact he couldn't finish up that Friday because it was late—it was after 5:30. I went home. The man remained. He was supposed to come back Monday and he never did.

Q. Now, did you have another conversation with Mr. Schmalholz about the chicken feet in January?

A. That is right.

Q. About what part of January?

A. I believe it was the first part of January.

Q. Of 1944?

A. Of 1944.

Q. Now, was it over the telephone?

A. No, sir.

Q. Or was it in person?

A. No. I came to Mr. Schmalholz's office.

Q. Will you tell us what you said to Mr. Schmalholz and what Mr. Schmalholz said to you?

A. Mr. Schmalholz told me that there is charges and affidavits against me, that I made compulsory sales or my men did. I said, "Schmalholz, you know that we were selling chicken feet; you know that we were selling [fol. 206] gizzards; you know that we were selling livers. We were selling chickens, drawn, eviscerated, and we are selling other commodities. If I am not permitted to sell any chicken feet would you please give me a letter to that effect?" He said, "Oh, no." Then he says, "You know what the result is. You can settle this case here." I said, "Mr. Schmalholz, I have nothing to settle." He says, "Then you will have to go to court." I said, "Wherever I want to go, if I have done anything wrong, I want to face the court."

Q. Mr. Kraus, you instruct your salesmen as to their duties from time to time, don't you?

A. That is right.

Q. And you instruct your salesmen to sell gizzards?

A. Yes, sir.

Q. And you instruct them to sell chicken skin?

A. That is right.

Q. And chicken feet?

A. That is right.

Q. You are in the merchandising business?

A. That is right.

Q. And you aim to move the merchandise?

A. That is right.

Q. Did you ever instruct your salesmen or anybody working for you to compel a customer to take chicken feet?

A. No, sir.

Q. Your instructions are to sell whatever you can?

A. That is right.

Q. And use salesmanship?

A. That is right.

Q. You buy whatever you can move?

A. That is right.

Q. And you sell it?

A. That is right.

Q. If you can?

A. That is right.

Q. Did you ever instruct your salesmen to make it a condition of any sales of chickens and turkeys that the customers must take gizzards or chicken skin or chicken feet?

A. No, sir.

Now you may examine.

[fol. 207] Cross examination.

By Mr. McAuley:

Q. Mr. Kraus, you are president of your corporation?

A. That is right.

Q. And who are the other officers?

A. My son is vice-president, and my brother is secretary and treasurer.

Q. And you employ an attorney, do you? You employ an attorney in the course of the year?

A. Yes.

Q. Who selects the attorney?

A. I do.

Q. And you employ an accountant?

A. Yes, sir.

Q. Who selects the accountant?

A. I do.

Q. Do you employ a bookkeeper?

A. Yes, sir.

Q. Who selects the bookkeeper?

A. I do.

Q. Can you give us an idea of the volume of business that is done by your firm in the course of a year?

A. Which year are you referring to?

Q. Well, for the last five years?

A. Well, our business was running from seven to seven and a half million dollars a year.

Q. Gross business, is that correct?

A. Yes, sir. And last year we done not quite four million dollars.

Q. You draw a salary?

A. I do.

Q. You draw a salary every week?

A. Every week, yes.

Q. Does your corporation vote you a bonus at the end of the year?

A. Sometimes.

Q. Were you voted a bonus last year?

A. No, sir.

Q. You drew nothing from the corporation beyond your weekly wage, is that right?

A. That is right.

Q. You received no dividend or bonus of any type or description?

A. No, sir.

Q. From the net earnings of the corporation?

A. No, sir.

Q. Is that correct?

A. Yes, sir.

[fol. 208] Q. You are on the premises every day?

A. Every day.

Q. You are not in any sense retired?

A. No, sir, not yet. I have to go back to work since my sons are in the army.

Q. Who instructs the employees in their duties?

A. We have a meeting once in a while.

Q. At meetings?

A. At meetings, after three o'clock, after business is over and we go over matters, what is coming, what is selling, talk about customers.

Q. You try to be a wide-awake executive, is that right?

A. I think I am.

Q. And keep your fingers right on all conditions?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. Would you say that you were one of the largest of the meat and poultry dealers in the City of New York at the time that you were invited to attend the conference indicated by this telegram?

A. Yes, sir. I wouldn't say I am the largest.

Q. One of the largest?

A. Oh, no.

Q. You are not as large as Swift or Cudahy, is that right?

A. Positively not.

Q. But leaving out the big Five you are one of the largest dealers, is that correct?

A. I do not think so.

Q. Would you say that you are represented as the big type of dealer?

A. I am an average business man. I do not think of myself as bigger than others. I do not know anybody else's business.

Q. You do the buying?

A. Occasionally.

Q. Well, who else does the buying?

A. Mr. Harriss.

Q. Who arranged for this turkey car to come in from the West, from Denver?

A. I did.

[fol 209] Q. That was your job?

A. Yes, sir. They were contracted a year before they came.

Q. You know, don't you, that your corporation bought 100 pounds of chicken feet at 3 cents a pound from the Bil Company on 14th Street last year?

A. Not to my knowledge.

Q. Would it surprise you if your corporation did buy 100 pounds?

A. Perhaps. Perhaps they did buy. I don't know. We bought a lot of stuff from Bil Company. We sold them a lot of stuff.

Q. Did you buy chicken feet at 3 cents a pound?

Mr. Sahn: Just a minute.

Q. —from the Bill Company on West 14th Street?

Mr. Sahn: I object to that unless counsel wants to open up the door to all similar such sales.

Mr. McAuley: Just a second. I will open up any door.

The Court: Overruled.

Mr. Sahn: All right.

Q. Did your company buy at least 100 pounds of chicken feet at 3 cents a pound from the Bil Company on West 14th Street?

A. Perhaps they did, and if there is any salesman or whoever bought it—I did not buy it, but if any man bought it—

Q. Do you know what your company does?

A. I do, but there are many things, Mr. McAuley, certain things that my men are privileged to buy besides me O. King it.

Q. Well, who acquaints your salesmen with the scope of their authority?

A. I do give them certain authorities that they can buy and that they can sell.

[fol. 210] Q. Do you know how long the Bil Turkey Canning Company has been in existence?

A. Oh, they are in existence about three years.

Q. Have you dealt with them—do you know that you have dealt with them?

A. Oh, yes, sure I do.

Q. Would you deny that your company bought chicken feet at 3 cents a pound?

A. I say I am not aware of the fact. Therefore I can not put in a denial. Perhaps any one of my managers or salesmen went out and bought it. Not to my knowledge. Perhaps if I'll go over the books and check I can find it.

Q. You have been eviscerating poultry for the last few years, haven't you?

A. Not the last few years; I have not.

Q. How long?

A. Only for about eight months.



Q. Were you doing it last November, 1943?

A. No. We stopped last November, 1943, on account of the new ruling, Mr. McAuley.

Q. When did you stop?

A. I think we stopped in October when the new law came out overnight and stopped any poultry to be eviscerated or drawn within an area of 50 miles, and that happened overnight, too.

Q. Does part of the process of evisceration mean that you take the outer skin off the chicken?

A. No, sir.

Q. And did you sell the unskinned breasts?

A. No, sir. Eviscerated means an entirely different thing.

Q. What does it mean? Tell us what it means.

A. Eviscerated poultry is eviscerated in a federal-inspected plant. The entrails are taken out, the liver and the gizzard and the heart is put back in the chicken; the chicken is wrapped and must be quick-frozen. That is called eviscerated.

Q. Is that with the skin on?

A. With the skin on, yes.

Q. Can you tell us where you got the skin which the [fol. 211] witnesses today and yesterday testified was sold to them?

A. Yes. We bought them from Scott's Bluff, from the Blue Diamond Poultry Company—Blue Diamond Poultry and Egg Company.

Q. And do you know what you paid for it a pound?

A. I believe we paid  $23\frac{1}{2}$  or  $24\frac{1}{2}$ . It is on the bill there.

Q. You have the bills here?

A. Yes, sir.

Q. You are positive that in no sense was it skins that you had a waste product ever left over?

A. I do not quite get it.

Q. You are positive that the skins you gave to these customers, that you claim you sold, that that wasn't a waste product left off from your previous skinning of chickens?

A. I haven't skinned any chickens.

Q. When you eviscerate chickens do you cut the feet off?

A. Yes, sir.

Q. The feet and the head?

A. Yes, sir.

Q. Were the feet that you had a left-over product from your previous evisceration of chickens?

A. Some of it.

Q. Well, how much of it?

A. Oh, quite some.

Q. On this bill which I am willing to offer in evidence, will you explain to me why there aren't any chicken feet on there?

A. That man did not have any at that time. He sold them to a feed company.

Q. Well, there is testimony in this case, I think, that about 35 barrels of chicken feet were sold. Can you produce bills for 35 barrels?

A. We can produce bills for over 100 barrels of chicken feet. They were in the freezer. I believe that my counsel has got everything.

Q. You believe it?

A. No, I know it.

Q. Well, has he? That is what I want to know.

A. Yes, he has, because they were in the freezer. What [fol. 212] ever we couldn't sell during the heat of the summer, when they are not selling fast enough, we put in the freezer and we have freezer receipts for it.

Q. But this fellow did not have any feet, is that the idea?

A. No, sir. He sold them to a meal company which they grind it and put it in feed for chickens and turkeys. I would like to buy a couple of cars of chicken feet right now.

Q. Who are your salesmen at the place, at the place where chickens and turkeys are sold?

A. Mr. Lotto is managing the place on 410 West 14th Street. Mr. William Harriss is the salesmanager at 20 Tenth Avenue.

Q. Just those two men?

A. No, there are other salesmen.

Q. Who is Oscar?

A. Oscar is a clerk in the office, just taking cash if there is any cash sales.

Q. Does he sell poultry?

A. No, sir.

Q. Who is Jack?

A. Jack is one of the assistant salesmen. Prior to the war he was handling in one department poultry on 20 Tenth Avenue. Since conditions have changed I detailed — to go and help along on the 14th Street place.

Q. Is it correct on three days of the Thanksgiving holiday season of 1943 you sold 10,000 pounds of chicken feet?

A. I couldn't tell unless I would see the sales.

Mr. McAuley: Will you wait just a moment?

Q. Do you keep in touch with your volume of sales or turnover?

A. I certainly do, Mr. McAuley. But I have to see figures before me. I don't handle two or three items.

Q. Well, offhand, would you say that is away out of line, 10,000 pounds of feet?

A. No, it wouldn't be out of line. We may sell 20,000 or 30,000.

[fol. 213] Q. In three days?

A. Yes. Would it be out of line to sell one car of turkeys at Thanksgiving when we have sold 100 or 125 cars of turkeys?

Mr. Sahn: If counsel is interested in figures I will stipulate as to the exact figures we had for the month of November, or any other month he wants, on chicken feet, skin, gizzards and chickens themselves.

Mr. McAuley: Just feet and skins.

Mr. Sahn: Will you stipulate as to our total also, the total of ours?

Mr. McAuley: Of business?

Mr. Sahn: Yes.

Mr. McAuley: Surely. We will get together with you later.

Mr. Sahn: All right.

Q. Now, Mr. Kraus, if you know will you tell us, taking an average of the last year or two, your opinion of the resale value of chicken skin from the retailer to the general public. I ask you that because we have had testimony that it is a waste product relatively worthless, and so I now ask you as a butcher familiar with wholesale and retail and public consumption of poultry and poultry products, will you tell me your best opinion over the last two or three years or five years or ten years of the commercial value of chicken skins sold as a separate item to the general public, either for use in the case of a burn or to make a soup or any other use known to mankind?

A. Yes.

Q. Will you tell me what the value is per pound?

A. The value is anywhere from 25 to 30 cents a pound. Now, it is not used for a burn, Mr. McAuley. Chicken fat [fol. 214] to day, chicken fat is used in manufacturing for chicken salami, for patties, for different things which they make today on the quick stands. It is also taken out—the fat out of chicken skin because chicken fat is worth today anywhere from 80 to 85 cents, a pound.

Q. Was it your understanding that any of the government witnesses are salami sellers?

A. I am not interested if they are. Some are. Some are manufacturing and they have got small—

Q. Well, is that a fact? Were they asked that by your counsel today, whether they make salami on the side?

A. I don't know what counsel asked them.

Q. Did they misstate their occupation or trade when they said they were retail butchers?

A. They did not. They are sold—a lot of people buying chicken skin cut it up for different things—take the fat out of it, and chicken fat is very high.

Q. Do you know whether it can be purchased in the Atlantic & Pacific meat markets?

A. I don't know if they handle it.

Q. Do you know if it can be purchased in R. H. Macy's meat division?

A. I don't sell anything to R. H. Macy.

Q. I know you don't, but I am just asking you.

A. When I am selling—pardon me, Mr. McAuley, I will try to answer to the best of my ability. We do sell to all the chain stores and the chain stores are using gizzards.

Q. I am not talking about gizzards.

A. They do not use chicken fat because most chicken fat is used by a foreign element most, which they put in the pan and take out the fats; some chop it up in different things.

The Court: I think we will take a recess for a minute or two.

(Short recess.)

[fol. 215] Q. Mr. Kraus, you are aware, of course, of the fact that the butchers who testified come from various parts of New York: Mt. Vernon, the Lower East Side, Yorkville?

A. Yes, sir.

Q. The West Side Lower?

A. Yes.

Q. The Thirties on the West Side—you are aware of that fact?

A. Come from all over.

Q. So that in your opinion is it fair to state that your clientele is fairly average?

A. No, they are not.

Q. Is it not correct? We have had some who testified they have a continental trade by telephone—French clients?

A. Yes.

Q. European?

A. Yes.

Q. American?

A. Yes.

Q. Jewish?

A. Yes.

Q. German?

A. Yes.

Q. Irish?

A. That is right.

Q. Isn't that when you might call cosmopolitan?

A. That is right.

Q. Do I understand you to say that during the past five years and today there is a solid demand on the part of the consuming public to buy chicken skin and that they are willing to pay 30 cents a pound and upwards for it?

A. Yes, sir.

Q. You state that as a fact?

A. Yes, sir.

Q. Although you have heard the witnesses for the government testify that in the vast majority of instances they had to throw it away?

A. I don't know what they have done with it.

Q. You heard them testify to that?

A. Yes, sir.

Q. And yet you say there is a solid, definite demand?

A. A definite demand.

Q. At 30 cents a pound and upwards?

A. And lower than that. It is all depends on conditions.  
[fol. 216] Q. Well, you know you charged 30 cents a pound for it?

A. Yes, sir.

Q. Now let us switch from the skin to the feet. I ask you the same question: Taking an overall average of the general public, I ask you over the last five years is there a

steady demand for chicken feet, and if so on an average, what is the general public willing to pay for chicken feet per pound?

A. First, the demand is only in the last two years.

Q. Is that because—

A. When eviscerating—when drawing poultry came into effect.

Q. Is it your claim that soup has become popular because of the war?

A. Yes, sir.

Q. Soup?

A. Not only soup, but they make gelatines—they cut it up.

Q. From chicken feet?

A. What?

Q. Ground chicken feet?

A. No ground; it is cut up. Grinding is through the mills.

Q. Do they pickle it also?

A. I do 't know if they know—I don't think they pickle it.

Q. What is the price that the public is willing to pay in the last two years for chicken feet for any reason whatever?

A. Anywhere from 12 to 15, 16 cents.

Q. But you heard the government witnesses testify that in most instances they gave it away to their customers or dumped it?

A. Well, in many instances—

Q. Did you hear them testify to that?

A. Yes, sir.

Q. So far as you know there is no reason, if they are telling the truth—so far as you know they made a mistake, is that right?

A. I think they told the truth. I don't know what else they could tell but the truth.

Q. It was bad judgment so far as you are concerned; they should have waited a few days and customers surely would have come in and paid 30 cents a pound?

[fol. 217] A. I don't know what they surely could have done. I am not running their business.

Q. But you are telling me that there is a constant, solid demand for it for two years?

A. There is a demand, yes.

Q. Then if it is so, it is bad judgment to throw it away?

A. If they haven't got proper refrigeration and they keep it too long they will have to throw it away.



Q. I thought you said the demand was current and running and solid, particularly so far as the feet was concerned so they wouldn't have to wait long?

A. There is many times the butcher will buy something and he cannot sell it right away and it will get spoiled. Not only chicken feet but any other meat, when it gets spoiled he has to throw it away.

Q. Well, in your business do butchers as a matter of habit over many many years—do they only buy what they can keep in the refrigerator or what they can dispose of overnight before it spoils? Is that the habit of butchers?

Mr. Sahn: I object to this line of testimony, as having no bearing on the issue. If the District Attorney wants I will present the best evidence and get these butchers on the stand, but he has already objected to that type of evidence.

The Court: He has a butcher on the stand. I will overrule your objection.

Mr. Sahn: Well, I will give him the butchers themselves.

Mr. McAuley: You had the butchers and you had a chance to cross examine.

Q. Now another thing, Mr. Krays, I notice in looking at these invoices that the invoices for skins and feet match [fol. 218] the invoices for the turkeys box for box, 2 for 2, 3 for 3, and 4 for 4. You may examine them all if you wish. Is that a coincidence (handing witness)?

A. It is no coincidence.

Q. Well, can you tell us by reason of your familiarity with your own business why it is that in each instance, if they get 3 boxes of turkeys they got 3 barrels of chicken feet?

A. 3 barrels?

Q. Or boxes; or if they bought 2, they got 2 boxes of skins; or if they bought 4 they got 4 boxes of skins or feet?

A. Let me see. (Examining.) That wouldn't matter. If a customer comes in and a salesman asked him "Could you use 2 or 3 boxes of chicken skin," or "could you use a barrel of chicken feet," or "2 barrels or 3 barrels"—some may use more and some may use less. The salesman is there. He had so many different items to sell and he is getting paid for that purpose, to sell.

Q. From what you said do I understand this: Do I understand that you instruct your salesmen to push feet and skin?

A. I told him to sell them.



Q. Do you pay them a premium commission?

A. They do not get paid commission. They get paid salary.

Q. Well, you know what a push item is, whether it is shoes or chickens?

A. Anything we have got to sell, Mr. McAuley, we just ask our salesmen to sell it.

Q. You know what a push item is, don't you?

A. I don't know what it is.

Q. You know in a restaurant if they have pea soup left over from yesterday and they want to sell it, they will tell their salesmen to sell it?

Mr. Sahn: I object to that as incompetent.

Mr. McAuley: I am asking him whether that is so with feet and skin.

[fol. 219] The Court: I will allow it.

Mr. Sahn: Exception.

The Court: I do not think it is a very happy illustration.

Mr. McAuley: There are any number of others. That one just came to mind. I know a joke about it.

Q. All right, Mr. Kraus, will you give me the answer, whether that was a slow-moving item on which you were offering a premium to salesmen for them to push it and told them to ask each and every customer "Don't you want some skin?"

A. Mr. McAuley, I don't offer any premium. They get the list, what we got, and they are there for the purpose of selling, and if they wouldn't be a proper salesman I wouldn't have them there.

Q. Can you give me any explanation for the fact that none of these Government witnesses testified to having asked if they would like some nice chicken necks?

Mr. Sahn: Objected to.

Q. Or some nice chicken breasts?

A. We do not sell chicken breasts.

Mr. Sahn: Just a minute, Mr. Kraus. That is objected to as argumentative.

Q. Would you sell necks?

A. Occasionally.

The Court: I will allow it.

Q. There is a little meat on a neck that you can eat, isn't that right?

A. Yes.

[fol. 220] Q. I ask you, can you explain to me why none of the Government witnesses were asked why they wanted necks?

A. We did not have them at that time; couldn't get them.

Q. Oh, you could get—all you could get were skins and feet, is that right?

A. Oh, no; we got gizzards, we got livers, we got hearts; just got in a shipment from Campbell Soup Company.

Q. I am talking about November, 1943.

A. If you will permit me, you asked me if only chicken feet, and I say to you that we sell gizzards. We got in a shipment of gizzards and livers.

Q. I am talking about November, that holiday season.

A. We did not have any.

Q. You were overloaded on feet and skins, is that right?

A. Not overloaded on skins. We had quite some feet on hand. We had only a small shipment in one car of chicken skin.

Q. Did you have any hearts?

A. Oh, yes, we had hearts.

Q. How is it that none of these customers—

A. Because they were sold prior to that.

Q. None left for them?

A. No. There are certain seasons in the year—

Q. Well, I am just talking about this one season, November 4th to 24th, the so-called Thanksgiving holiday season.

A. Yes. That is all we had left, is chicken feet and gizzards.

Q. And skin?

A. And we had some skin left.

Q. Now, this money appearing on these invoices, that went into the corporate till, did it?

A. Oh, yes, definitely—what do you mean, Mr. McAuley?

Q. I am just asking you, these are not dealings, transactions made by your salesmen without your knowledge?

[fol. 221] A. They are here on the bills. You can go through the books.

Q. That is what I mean. You went over these with your accountant from time to time?

A. Yes.

Q. And you understand some of the witnesses in this case have testified that for three months before and three months after—and one testified up until April 18th he had the same type of transaction in your place?

A. We are selling gizzards and livers and hearts today.

Q. No. I am talking about skin.

A. They had in that week—skins we haven't got any more.

Q. That is all I am talking about, the skin and feet.

A. We have no more feet. We can't get any.

Q. Now I assume you have had several conferences with your accountant since July, 1943?

A. We have every—we have a detail accountant come down three days a week.

Q. And you have gone over the profit on skins and the profit on turkeys?

A. Give me the amount of business we have done, yes.

Mr. McAuley: That is all.

Re-direct examination.

By Mr. Sahn:

Q. You were asked, Mr. Kraus, about the demand for chicken feet by your customers. Are your customers demanding chicken feet from you today?

A. Yes.

Q. Do you have any chicken feet to sell them?

A. No.

Q. When did you run out of your stock of chicken feet?

A. I can't hear you.

Q. When did you run out of your stock of chicken feet?

A. About last December, 1943.

[fol. 222] Q. From that time has the demand for chicken feet at wholesale at your place of business been fairly constant from you?

A. Yes.

Q. By your customers?

A. Yes.

Q. Do you have any chicken skin today?

A. No, sir.

Q. Have you had a demand for chicken skin ever since you ran out of it?

A. Yes, we have had.

Q. Have you tried to buy chicken skin?

A. I did.

Q. Have you tried to buy chicken feet?

A. Yes, sir.

Q. Again, Mr. Kraus, I ask you, did you ever make any condition that any sale of poultry to any customer—that that customer must buy chicken skin, chicken feet or gizzards?

A. No, sir.

Q. You never instructed your salesmen to make that a condition of any sale either?

A. Not in any commodity.

Mr. Sahn: That is all.

Recross-examination.

By Mr. McAuley:

Q. Mr. Kraus, this demand for chicken feet since last December that Mr. Sahn has talked about—has that been a demand on the part of the ordinary family butcher to sell to the consuming public, or has it been the demand coming from the bologna and salami processors?

A. Well, chicken feet they can't put in any salami or in any other processing, no.

Q. Or jellies or gelatines or anything?

A. Yes.

Q. Has the demand, I am asking you, since last December, come from the ordinary family butcher so that he may sell those feet to the general public, or has it come from people who are processors of salami or anything of that sort—bologna?

The Court: Soup?

[fol. 223] Q. Or soup.

A. All from retail butchers, from our trade.

Q. The ordinary family trade?

A. Yes, that is right.

Q. The same type of butcher that took the stand here?

A. That is right.

Mr. McAuley: That is all.

Redirect-examination.

By Mr. Sahn:

Q. One more question, Mr. Kraus. Are you familiar with these cut parts of poultry stores throughout the city?

A. Yes.

Q. Do you know what these stores sell?

A. Yes.

Q. What do they sell; tell us?

A. Well, cut up chickens, the breast part, the legs, the backs, the wings—all in parts.

The Court: Those parts retain the skin, don't they?

The Witness: Yes, sir. The only skin is taken off is by people which pack poultry in cans for the Government. That skin is taken off and sold and used every day.

Q. In these cut-part stores, if you know, are chicken feet displayed, if you know?

A. I don't get you.

Q. Have you ever been in any of these cut part stores?

A. No, I never did go into them.

Mr. Sahn: That is all.

Recross-examination.

By Mr. McAuley:

Q. Mr. Kraus, are you familiar with the type of store described by your counsel, the one which is on 188th Street [fol. 224] and Grand Concourse in the Bronx, and another one of which is on Fordham Road on the south side between Elm Place and Tiebout Avenue?

A. I live on Fordham Road but I never went in the stores.

Q. Well, isn't it true that if I went into one of those stores last night or the night before or two weeks ago the most they would ask me for a pound of chicken feet is five cents?

A. I do not know—

Q. Wait a moment—And that at any such store in the City of New York I can buy chicken feet from three to five cents a pound?

A. I don't know what you can buy, Mr. McAuley.

Mr. McAuley: That is all.

The Witness: I know what I can sell.

Mr. McAuley: That is all.

The Witness: The commodity may be worth to one person a cent a pound and maybe worth 25 cents a pound to another.

Q. Would you deny that in such stores throughout the City of New York I can buy chicken feet currently for no more than a nickel a pound?

A. No. You may be a better buyer than I.

Q. You do not have to haggle—

Mr. Sahn: I object to that, your Honor.

A. Are you making a statement?

Mr. Sahn: I will produce the testimony if Mr. McAuley wants it.

Q. Do you know or don't you know?

A. I have never visited them, in that kind of store; probably you did.

[fol. 225] Q. Are you familiar with current conditions on the eviscerated poultry parts; you are an evisceration expert for the last two years.

A. Please permit me, I am not an expert.

Q. Well, that is a big part of your business?

A. I beg your pardon, it is not.

Q. I thought you said it was?

A. Now, Mr. McAuley, you are quoting things which are not true.

Q. I will ask you again—

A. Permit me, I have eviscerated poultry in a federal inspected place. It was properly supervised under government supervision and sold, as it should be sold, but I don't go visiting stores. You asked me before what I do from 8 till 6 or 7 o'clock, and I say to you that I have a lot to do to watch my business, not somebody else's business.

Q. I ask you this, are you aware of the fact that in the last three or four years around the City of New York there have sprung up chains and individual butcher shops selling right on the counter, breasts, necks, gizzards, hearts, legs, feet and such—are you aware of that fact?

A. Not only in the last two years, Mr. McAuley—you are jumping ahead. It is only since the war. There were very few of them stores.

Q. Well, you were aware of that?

A. It seems you know more about them than I do. I don't. I don't watch stores.

Q. When you date "since the war"? Does that date from December 7, 1941?

A. I wouldn't say that date. That date I was on my farm in Goshen—it was on a Sunday, which is unfortunately I had a bad dinner, too.

Q. Don't tell us about the dinner on Pearl Harbor day.

A. But the 7th was on a Sunday. You recall, Mr. McAuley, so that I couldn't be in a store.

[fol. 226] Q. I ask you again—if you don't know, say so.

A. I do not know—what do you mean by that?

Q. Isn't it a fact that anywhere in New York I as a buying part of the public can buy chicken feet and could do it last year or last week at a top price of 5 cents a pound?

A. I don't know what you can buy it for but I know you can buy chicken feet, and chicken feet are sold. If you can buy them for five cents or one cent, I don't know.

Q. Well, I am asking you, do you know that five cents is regarded as top price?

A. I do not.

Q. By such retailers of chicken feet—do you know that?

A. I do not.

Mr. McAuley: That is all.

Mr. Sahn: That is all. Step down.

Mr. Sahn: I will recall Mr. Bungard, to the stand.

DAVID M. BUNGARD, recalled.

Direct examination.

Continued by Mr. Sahn:

Mr. McAuley: Is this a character witness or is this the same as we had before?

Mr. Sahn: This is not a character witness.



The Court: He is an expert on the price of chicken feet, isn't he?

Mr. Sahn: Just chicken feet.

Q. Mr. Bungard, were you in the courtroom when the district attorney propounded these questions to Mr. Kraus about the average price of chicken feet in retail stores?

A. I apparently was.

[fol. 227] Q. Are you familiar with the price of chicken feet as sold by chicken stores to the consumers?

A. I am not.

Q. Are you familiar with the price that you get for chicken feet?

A. I am, sir.

Q. What do you get?

A. From 15 to 20 cents a pound.

Q. Do you have a steady demand in these stores for these feet?

A. I have created a demand in my store ever since I have had the store.

Q. And have you been able to get in recent months all the chicken feet that you needed for sale in your stores?

A. Well, the only place that I bought them was down from Max Kraus, and when he had no more why I then did not get any more chicken feet.

Q. And you have tried to get it again?

A. I did, sir.

Q. And you have asked for those chicken feet?

A. I have, sir.

Q. Do you know from your observation in going through the city whether chicken feet are also sold in other stores?

A. Yes, sir.

Q. These stores that sell cut parts, would you call that eviscerated poultry?

A. I wouldn't call that eviscerated poultry, no, sir.

Q. What is eviscerated poultry?

A. Well, to begin with, I think Mr. Max Kraus very ably explained that. To eviscerate poultry it must be done under Government inspection.

The Court: What do you mean by that? No matter where it is done—what is the use of wasting time about the inspection business.

The Witness: Judge, your Honor—

The Court: What does it mean.

The Witness: It means it has to be drawn a certain way and eviscerated poultry is not cut up.

The Court: That is the answer.

[fol. 228] Q. It is in a whole carcass?

A. Definitely.

Q. It is not cut up?

A. Definitely.

Q. And these stores that are selling cut parts are not eviscerated stores?

A. No, sir.

Q. They are just cut part stores?

A. Just cut-part stores.

Mr. Sahn: That is all.

Cross-examination.

By Mr. McAuley:

Q. But chicken feet are no part of the eviscerated poultry, isn't that right?

A. No, sir.

Q. Did the bright idea of creating a demand among your consuming public ever occur to you until you got billed for chicken feet by Max Kraus last year?

A. I can answer that question only one way.

Q. Just answer it. Did your idea of developing a consumer demand among your trade—did that ever occur to you before you got a bill for chicken feet from Max Kraus a year ago?

A. I never got a bill from Max Kraus for chicken feet unless I asked for it, and what is more, I have been buying for months. When I saw the demand in our store I happened to be in the neighborhood where the people would ask for the feet of their chicken, have it cut off, and I saw a demand where people would come in and ask—they wanted chicken feet, and then when I found Mr. Kraus had it, I requested chicken feet, and as I said before, I wouldn't take chicken—

Q. How much did you get a pound last November?

A. From 15 to 20 cents a pound.

Q. You never got 30 cents, did you?

A. No, sir.

Mr. McAuley: That is all.

Mr. Sahn: That is all.

[fol. 229] NATHAN LOTTO, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sahn:

Q. Mr. Lotto, what is your business?

A. Salesman, selling poultry.

Q. For M. Kraus & Brothers?

A. For M. Kraus & Brothers.

Q. How long have you been working for M. Kraus & Brothers, Inc.?

A. Oh, around 25 or 26 years.

Q. And you have always sold poultry?

A. Poultry.

Q. Were you employed by M. Kraus & Brothers, Inc., in or about the month of November, 1943?

A. I was.

Q. And where is your principal place of business, at the 14th Street place of Mr. Kraus, or Tenth Avenue?

A. 410 West 14th Street.

Q. And you more or less manage that 14th Street place, is that so?

A. Right.

Q. Do you know a witness by the name of Manuel Cuet?

A. I just know him by sight.

Q. Did you ever sell him any poultry?

A. I did not.

Q. Mannel Cuet testified that he bought some turkeys on November 24th, he got those turkeys over at Tenth Avenue?

A. He got those turkeys over at Tenth Avenue.

Q. You did not sell him those turkeys?

A. No, sir.

Q. Did you sell Mr. Braverman three barrels of chickens?

A. I did.

Q. As a condition of the sale to Mr. Braverman of those chickens, did you demand and compel Mr. Braverman to take five pounds of chicken feet for each barrel of chickens sold to him?

A. Never did.

Q. Did you try and sell Mr. Braverman chicken feet?

A. I asked him to buy it but I never forced him to buy it.

[fol. 230] Q. You asked him if he would buy chicken feet and he did not refuse to buy them?

A. No.

Q. And he bought five pounds of chicken feet with each barrel that he bought that day?

A. He did.

Q. Did you ever force or compel anybody to take chicken feet or chicken skin or gizzards as a condition of a sale of poultry to them?

A. Never did.

Q. What else do you sell there at 14th Street?

A. Well, right at the moment, right now we are selling poultry only and we are selling some gizzards, livers,—of course that is in poultry.

Q. Do you sell gizzards?

A. Yes.

Q. Do you sell livers?

A. Yes, sir.

Q. And do you sell chickens in the whole carcass, that is, the whole chicken?

A. Well, the whole chicken, yes, not eviscerated.

Q. Not eviscerated?

A. Not eviscerated, no.

Q. This is a city-dressed chicken?

A. Yes, sir.

Q. And you sell that today?

A. I do sell that today.

Q. Do you know the night before what you generally have for sale the following day?

A. I do.

Q. And you as a salesman try to dispose of all of your merchandise?

A. I do.

Q. And if a customer comes in and asks you for chickens you sell him chickens?

A. I do.

Q. Did you ever refuse to sell a customer chickens because he wouldn't take chicken feet?

A. Never did.

Q. Did you ever refuse to sell a customer chickens because he refused to take gizzards?

A. Never.

Q. Did you ever refuse to sell a customer chickens because he refused to take chicken skin?

A. No, sir.

Q. When a customer tries to buy chickens do you try to sell him chicken skin?

A. No, sir.

[fol. 231] Q. Do you try—

A. I just ask him, but I do not force him.

Q. You believe it is part of your duty as salesman to sell all of your products?

A. I do.

Q. You have a refrigerator in back of your store at 14th Street?

A. Yes, sir, a cooler.

Q. And do you keep poultry there?

A. I do.

Q. Do your customers ever walk in there?

A. All the time.

Q. All the time?

A. Yes, sir.

Q. Did you ever refuse access to that refrigerator to any customer?

A. Never did.

Q. So that if Abraham Mandel testified that in February or March of this year you refused to allow him to enter the refrigerator he was not telling the truth?

A. I never had that occur to me, that somebody wanted to go in and I wouldn't let him go in. That did not occur to me.

Q. Did you ever refuse to allow anybody to enter the store itself?

A. No, sir.

Q. Do you know Abraham Mandel?

A. I do.

Q. How long have you known him?

A. Oh, I should judge around four or five years.

Q. Do you recall selling to Mr. Mandel some poultry in the month of November 1943?

A. I imagine so.

Q. Mr. Mandel testified that he bought some poultry on November 10, 1943, 421 pounds of chickens' and he submitted a ticket here to that effect. Now if the charge slip shows a sale of 421 pounds to Mr. Mandel, you will admit that such a sale was made?

A. I will.

Q. I show you these papers, marked Government's Exhibits 1 and 2, and ask you if they refresh your recol-

lection as to the sale to Mr. Mandel on November 4, (handing)?

A. Yes, sir.

[fol. 232] Q. Government's Exhibit 1 shows the sale of 421 pounds of chickens, is that correct?

A. Right.

Q. And Government's Exhibit 2 shows the sale of what?

A. 14 pounds of gizzards, at 30 cents.

Q. Will you explain to the Court and jury how Mr. Mandel got those gizzards?

A. He asked for them and I sold them to him.

Q. He asked for the gizzards and you sold it to him?

A. Yes, sir.

Q. Did you tell Mr. Mandel that he could not get any chickens unless he bought those gizzards?

A. No, sir, I never did.

Q. He voluntarily asked for them?

A. He voluntarily asked for them, yes, sir.

Q. And he voluntarily took them away from there with him?

A. Right.

Q. I show you Government's Exhibit 3, which purports to be a sale to the Ideal Market, or Mr. Mandel, of 421 pounds of poultry and 20 pounds of chicken feet, and ask you to look at that (handing)?

A. Yes, that is right.

Q. Does that refresh your recollection as to the transaction that took place on that day?

A. Yes, sir.

Q. Did you force Mr. Mandel or the Ideal Food Market to take those 20 pounds of chicken feet?

A. Never forced anybody.

Q. Did you ask him to buy any?

A. I did ask him to buy it and he said he wanted it and there you are.

Q. And he voluntarily took the chicken feet?

A. Yes.

Q. And you did not compel him to take it as a condition to getting poultry there?

A. Never consulted anybody.

Mr. McAuley: Do I understand Mr. Sahn that the witness claims he made out in his own handwriting Government's Exhibits 1, 2 and 3?

[fol. 233] Mr. Sahn: I did not ask the witness those questions.

Mr. McAuley: Well, you refreshed his recollection.

Mr. Sahn: I will ask him those questions.

Q. Did you make out these charge tickets yourself?

A. I did not.

Q. Who made them out?

A. I have an understudy there who makes out all charge tickets.

Q. At any time?

A. At any time—no, this is at 14th Street.

Q. I mean at 14th Street?

A. Right.

Q. What is the name of the man who makes it out?

A. It looks like Elliot Kraus—that looks like his handwriting.

Q. That is Government's Exhibit 3?

A. Yes.

Q. And who made out the ticket, Government's Exhibit 2?

A. This I can't tell whose writing. It is different from that. I don't know whose this is.

Q. Whose is Government's Exhibit 1?

A. This is Elliot Kraus's also.

Q. You did not make out these tickets?

A. No.

Q. You have someone there who makes out the tickets?

A. Yes.

Q. Does Max Kraus ever make out tickets?

A. No, never did.

Q. Do you know Mr. Zweben?

A. Sam Zweben, only by sight.

Q. Only by sight?

A. Yes, sir.

Q. Did he ever buy any poultry from you?

A. In the last couple of months, that's about all.

Q. Did you ever compel Mr. Zweben to take any chicken feet or chicken skins in order to get poultry?

A. Never did.

[fol. 234] Q. Do you know Mr. Kuenzlen?

A. I just know him by sight. Now these—pardon me—these two last customers that you are calling out, they used to buy over at 20 Tenth Avenue and they used to buy poul-



try there. Now I never had much dealings with these two, but I do know these two parties by sight.

Q. Were you at 20 Tenth Avenue on November 24th?

A. Yes, sir, I was.

Q. Were you there the entire day?

A. No, just for about two or three hours, that's about all.

Q. And prior to that you were at 14th Street?

A. Right.

Q. When you were at 20 Tenth Avenue were the turkeys being delivered?

A. The turkeys were being brought down at the time that I got there, from the ramp upstairs.

Q. From the ramp of the railroad siding?

A. That is correct.

Q. How many turkeys did you get in that day, if you recall?

A. Well, I can't say. I looked over the invoices and I should judge there must have been between 30 and 40 thousand pounds.

Q. And that was one car of turkeys?

A. Yes.

Q. For Thanksgiving?

A. That's it.

Q. Do you recall generally how many cars of turkeys you handled in Thanksgiving of other years?

A. Between 100 and 150—between Thanksgiving and New Year's.

Q. Between 100 and 150 cars?

A. Yes.

Q. And here you had one car of turkeys for Thanksgiving?

A. That's it.

Q. And you had orders for more turkeys than you had?

A. That's it.

Q. Did you arrange with any of the other salesmen prior to November 24th as to the distribution of these turkeys, so [fol. 235] many to each customer?

A. I did. I had a little talk with Mr. Kraus and I told him that these turkeys should be rationed off to the steady customers that are coming in here, being that there ain't enough to go around, and give each one one or two or three boxes, according to what they are entitled to.

Q. And therefore on the following day each customer had a certain number of boxes of turkeys marked off for him?

A. That's it.

Q. Did you as a condition of the sale of the turkeys to these customers compel or require them to take chicken feet—

A. No, sir.

Q. —or gizzards?

A. No, sir.

Q. Did anybody in your presence, as a condition of the sale of the turkeys, compel them to take skins or gizzards?

A. Never did.

Q. Did Mr. Kraus ever tell you that you shouldn't sell any poultry or turkeys unless you could sell gizzards, feet or skin with it?

A. Never did.

Q. You did your job as a salesman or you tried to sell all your products?

A. That's it.

Q. Is that correct?

A. That is correct.

Mr. Sahn: You may cross-examine.

Cross-examination.

By Mr. McAuley:

Q. How long have you worked for Mr. Kraus, Mr.—

A. Mr. Lotto.

Q. —Mr. Lotto.

A. Between 25 and 26 years.

Q. You started at a low salary, I assume?

A. Well, no. I started there—in fact I worked about four or five years and then I worked up gradually until I went to work with Mr. Kraus.

[fol. 236] Q. What is your position today?

A. Salesman.

Q. What is your salary on an average?

A. About \$100 a week.

Q. \$100 a week. Are you a member of the union?

A. No, sir.

Q. You are not?

The Court: Why? Isn't it the same every week? Are you paid according to the amount sold?

The Witness: No, it is just only \$100 a week.

Q. You have no union card, is that right?

A. No. We have no union organization, if that is what you want to know.

Q. And Kraus is the only one you have worked for for 25 years, is that right?

A. Yes, sir.

Q. You are not a stockholder of the corporation, are you?

A. No, sir.

Q. Do you get any bonuses in addition to your salary?

A. Yes, sir.

Q. What kind of bonuses?

A. Well, it runs different every year. Last year it was different than the year before.

The Court: What is it based on?

The Witness: Well, it is according, I suppose—I don't know how they take it but I got \$750 bonus last year.

The Court: But you do not know how it is figured?

The Witness: No, I don't.

Q. Do you confer with Mr. Kraus from time to time about how things are going?

A. Oh, yes, every day.

[fol. 237] Q. Regularly, every day?

A. Every day.

Q. Do you report on what moves fast and what moves slow?

A. Yes.

Q. You are aware of the fact, aren't you, that in the last few years the demand for goods has exceeded the supply?

A. Yes, sir.

Q. You are aware of the fact that in many lines of business salesmen in the usual sense of the word have become non-existent?

A. What?

Q. There is no need for salesmen.

A. There is no need for salesmen today.

Q. The need today is for goods.

A. That is right.

Q. So that you don't function as a salesman in the real sense of the word?

A: No.

Q. Is that right?

A. Right.

Q. More as a clerk and handler of material?

A. That is right. Just to ration off to the customers, that is all.

Q. You do not know, of course, what Kraus paid for those turkeys?

A. No.

Q. That came in on the train from Denver?

A. I wouldn't know.

Q. You don't know that?

A. No.

Q. Do you sit in on firm conferences with Max Kraus and others?

A. Well, once in a while, yes, sir.

Q. In general have you found Mr. Kraus to be pretty well informed about the state of his business?

A. Very.

Q. Day by day?

A. Very.

Q. Knows just what is going on?

A. Yes, sir.

Q. No question about it?

A. No.

Q. Do you know what the situation is with retail butchers, about their likes and dislikes, their complainants?

A. Well, I wouldn't bother with that at all.

Q. I mean do you communicate their general satisfaction or dissatisfaction in their dealings?

[fol. 238] A. Well, I wouldn't bother with that at all because I will tell you why—

Q. If a good customer raises hell, if I may use that word, wouldn't you report that to the president?

A. Oh, yes, I would.

Q. That is the sort of thing I mean?

A. Yes, sir.

Q. And if they were tickled to death with the service you gave them, as a general matter, you would report that, wouldn't you?

A. I would report they were well satisfied with this or that.

Q. Did you ever have a conference with Mr. Kraus about whether the skins or the feet should be billed separately or along — the turkeys on the same bill?

A. No, I never had that occasion.

Q. Have you any idea why they were billed separately, the same sale, the same time, the same place?

A. It may have been a different lot of merchandise, to separate the weight from this or that. That may have something to do with it.

Q. That is what I am asking you. I see here, for example, on this one bill, Government's Exhibit 18 in evidence, there are four lines of writing?

A. Yes.

Q. And then they made a new bill for this one little line here, four boxes of skins, 100 pounds, at 30 cents a pound?

A. Well, that is very easily explained.

Q. Will you explain that, please?

A. On these four items here, there is two boxes of hen turkeys, meaning that the price of hen turkeys would be a different price than the 18 or 20 pounds of toms, and you can't put them all in at one price.

Q. Yes?

A. That would refer to that.

Q. Yes.

A. That is about all.

[fol. 239] Q. Then there is another notation—

A. You see, that is the difference in size, one to 12 to 14, and 1 to 10 to 12.

Q. And one are hens and one are toms?

A. The third item down there would be toms, tom turkeys.

Q. Yes.

A. That is 13 to 20.

Q. And you have to make out a different line because that is a different item?

A. Different item, different sizes, different prices.

Q. Well, likewise, isn't that true here? We have a different item, different size and different price? We have four boxes of skins of 100 pounds at 30 cents a pound. Isn't that the same difference between the hens and toms?

A. No.

Q. I ask you why that wasn't put on the same bill?

A. As I said before, it may be of a different lot, different merchandise. This is different from that (indicating).

Q. Oh, yes; skins are not turkeys.

A. This is all one lot (indicating). One lot number E, and that is a different lot (indicating).

The Court: You don't make out tickets at all, do you?

The Witness: I don't make out any tickets.

The Court: The cashier does all that.

The Witness: No. I have one or two men on the floor under me that does all that.

The Court: One or two?

The Witness: Yes.

Q. Well, here I notice, Mr. Lotto, on Government's Exhibits 11 and 12, we have the same thing; feet are different from chickens, aren't they?

A. Yes.

[fol. 240] Q. We have them on the same bill.

A. Well, that is very easily explained. This is a very small item and they put it on the same ticket, being out of the same lot.

Q. You do not mean the feet were the same—

A. Yes, that would be out of the same lot.

Q. You do not mean that they were the same feet that were on the feet of the same chickens?

A. No, not, this is different.

Q. Different feet?

A. Yes.

Q. Well, how is that—

A. These chickens are the whole chickens.

Q. With feet?

A. With the feet, and these feet here—

Q. All by themselves?

A. They are all by themselves.

Q. Now, what I want to find out is why a separate bill was not made out?

A. Well, that wouldn't make any difference. We can make out three or four or five tickets. There is no difference to this, that or the other (indicating). We could either put that all on one or we could make that all out on there. The only thing I have explained is that sometimes they like to keep things separate, like on this here (indicating).

The Court: How is it two men under you make tickets when you know so little about how and why they are made out?

The Witness: I know a whole lot.



The Court: Well, tell him about it. He is asking you.

The Witness: Well, I will. What do you want to know?

Q. I just want to know why we seem to have a different procedure here. In one case we have the feet tacked on to the whole chickens with the feet.

A. Yes.

[fol. 241] Q. And over here we have the turkeys all by themselves and we have a separate bill for the skins.

A. Would that be the same handwriting as that (indicating).

Q. Well, I wouldn't know. Would you take a look at it.

A. Well, you look at it and see.

Q. I am not a handwriting expert.

A. Neither am I. It may be that somebody else made it out for the turkeys.

Q. Well, the testimony is that those two tickets were handled at the same time by the same person?

A. Well, I don't know. It don't look like the same handwriting. It might have been somebody else made it out; in fact, this here was made out at 20 Tenth Avenue, and I wouldn't know who made this out, so far as I am concerned, not at 20 Tenth Avenue; only at 14th Street.

Q. Who is Bill Bolter?

A. Well, Willie Bolter is a salesman and he acts as part cashier.

Q. Where was he on November 24th?

A. On November 24th?

Q. When the train came in from Denver?

A. He, I imagine—or I wouldn't say I imagine. He was in the icebox at the time.

Q. Where?

A. At 20 Tenth Avenue.

Q. You have two iceboxes?

A. One at Tenth Avenue and one at 14th Street.

Q. Do you remember whether he was there or not?

A. Yes, he would be there; yes.

Q. Do you recall whether he or you made the sale to Mr. Zweben?

A. No.

Q. Would you look at the handwriting there? Can you tell us who gave the bills?

A. Well, I don't know the handwriting on here. The only thing I can tell you about this, as I said before, we made up



[fol. 242] a list, up in the office, and rationed out that car of turkeys, and he might have been on that list.

Q. Let us see if we can't go back. As I understand it, it was a special occasion. The train was coming in from Denver?

A. Yes.

Q. You had appropriated certain portions to your regular trade, is that correct?

A. Right.

Q. And you went up from the other place where you usually are, up to the siding there on Tenth Avenue, when the train came in. Now were you in charge of the stuff that day for distribution?

A. No, sir.

Q. Who was?

A. There is one by the name of Meyers and there is this Willie Bolter.

Q. When did you first know that the train was coming in from Denver?

A. The day before we got notice that a train was up around Buffalo, and the same day that we found out it was up at the 33rd Street yard.

Q. Who told you that?

A. I asked Mr. Kraus if the turkeys were in.

Q. Mr. Kraus?

A. Yes, and I think he said it is up at the 33rd Street yard.

Q. And what else did he say to you?

A. So I says, well, I'll be around late this afternoon and see if we can ration out the turkeys. We will talk it over.

Q. Do I understand you to say that he gave you no directions as to what to do about meeting that car and unloading it and distributing the turkeys to the various people?

A. No.

Q. He did not tell you?

A. No. We had our talk before.

Q. Was he interested enough to come up there himself?

A. No.

Q. To see the car come in from Denver?

A. No.

[fol. 243] The Court: You said before "We made a list for distribution." Who was the "we", you and Mr. Kraus?

The Witness: Mr. Kraus and I.

The Court: Made a list of the names that you were going to give the turkeys to?

The Witness: Yes, sir.

Q. Did Mr. Kraus go up to 20 Tenth Avenue when the train came in?

A. Well, he is at Tenth Avenue, and I told Mr. Kraus that I would be over a little later in the afternoon.

Q. Wait a minute. You say he is at Tenth Avenue. Isn't M. Kraus & Company at Tenth Avenue right next to the highway and right alongside of the railroad siding?

A. I will explain the way this is.

Q. Isn't that about right?

A. No. This is up on the second floor, and there is a railroad siding right up there.

Q. Right alongside of Kraus's?

A. Right alongside of the building, yes, sir.

Q. Was Max Kraus there that day when the train was unloading?

A. Not upstairs. He was down in the cooler.

Q. Yes, and he was there all the while?

A. Well, he was there. I don't know how long, but I know he was down there to look at it, to see what it looked like.

Q. And did you and he agree on the quota for different customers that day?

A. Yes. We were talking it over.

Q. I see. Zweben that day got two boxes of hens and two boxes of tims?

A. Yes.

Q. He was on this quota list which you and Mr. Kraus had agreed upon before?

A. On that quota list? I imagine so but I never had anything to do with that, though.

Q. But he was on this list, otherwise he would not have obtained turkeys on that day, is that right?

A. That's it.

[fol. 244] Q. And you and Mr. Kraus discussed this list?

A. Right.

Q. Who prepared the first suggested copy of the list with the different distributions?

A. Well, I suggested it to Mr. Kraus and we agreed with one another.

Q. Well, roughly, how many customers were on that list?

A. Well, maybe fifty or forty, or seventy-five—I wouldn't know—something like that.

Q. Were your original quotas accepted without question or were there any changes or suggestions?

A. Well, no.

Q. Did you give one a little more or less?

A. No, they all got about equal portions, one, two or three boxes.

Q. But you are the one who made out that list?

A. Well, I made it out and then Mr. Kraus looked it over.

Q. And then it was approved by him, is that right?

A. That is right.

Q. And how long did it take you to get that carload of turkeys from the car and into the icebox and to the retail butchers—how long did that process go on?

A. Well, I know the car was unloaded about two o'clock and I guess between three and four o'clock they were distributing it to the trade.

Q. It took about an hour and a half or so, or two hours' time?

A. Yes.

Q. Do you know whether Mr. Kraus stayed around until they were all distributed or did he leave early for home that day?

A. No. He was up in the office.

Q. In the office?

A. Yes.

Q. And he stayed until the whole carload was sold?

A. Yes.

By the Court:

Q. Had all these people, these 75 names that you put on the list—they had all asked for chickens and turkeys? [fol. 245] A. Well, they were good customers and they expect some every year from us.

Q. And you expect them?

A. And not only that, but we wanted to give them the

feeling of being satisfied and do the best for them, work with them.

Q. How did you know they would come around?

A. They are there practically every week.

Q. Well, they are not there for turkeys. They are not there for Thanksgiving turkeys every week?

A. Well, I wouldn't say that, but they are there for different merchandise, for meat. Turkeys are in season, they run from November until about January.

Q. You haven't any doubt that they would be there to buy your turkeys?

A. Well, they expected some.

Q. They must have notified you that they wanted turkeys?

A. Yes. They come around and say "Are you getting in turkeys?" and we say "Yes, we expect very little, not as much as last year, but we will do the best we can."

Q. And you prepared the list?

A. Yes.

Q. And Mr. Kraus went over it?

A. Yes.

Q. And said "We will let them have so many"?

A. Yes.

By Mr. McAuley:

Q. Do you recall Mr. Zweben getting four boxes that day?

A. Well, I wouldn't know.

Q. It is hard to remember?

A. It is a hard thing to remember.

Q. You handled five million pounds of poultry a year, is that right?

A. Five million?

Q. More than that?

A. I guess so.

Q. Well, at least five million pounds a year?

A. About that, yes.

[fol. 246] Q. It is hard for you to remember these four particular boxes?

A. It would be a hard thing for me to remember that. I wouldn't know whether he got two that day or four. I really wouldn't know.

Q. Well, if the bill indicates two hens and two toms, does that mean four?

A. No. There is three hens and one tom there.

Q. I see. Three hens and one tom?

A. Yes.

Q. All right. Of course you do not carry a gun, do you, in the normal course of your salesmanship?

Mr. Sahn: That is objected to.

The Court: Objection sustained.

A. I never did.

Q. What does the word "compel" mean to you?

Mr. Sahn: That is objected to as calling for a conclusion.

The Court: I will sustain that.

Mr. McAuley: That is all.

Redirect examination.

By Mr. Sahn:

Q. This list that you prepared, that was just the amount of boxes of turkeys on that list?

A. Right.

Q. There was no prepared list about chicken skin or gizzards or feet, was there?

A. Never.

Mr. Sahn: That is all.

Recross-examination.

By Mr. McAuley:

Q. By the way, did you notice any chicken feet or chicken skin around there between three and four o'clock when [fol. 247] you distributed it to the customers?

A. Around the place I did, surely.

Q. Is that right?

A. Oh, yes.

Q. Well, when you notified them, or you say they called up and asked "Can we get any turkeys," did you say, "Yes, come around between three and four."

A. Well, I put it this way: they all did not call up but in the course of time they asked me whether there would be any turkeys coming in and I said that "we expected a little turkeys but do not expect as much as last year, we will do as much as we can for you, we will try to please you."

Q. When you found that the train was in Buffalo, and found that it would be in New York at such and such a time, did you tell them when to come, that you would let them — when to come?

A. We told them to come that day, yes, because we already got notified that the train or the carload would be in on that certain day.

Q. Well, at that time did you also tell them what their quota was for the turkeys over the phone?

A. No. I just told them that we would try to do the best we can.

Q. And over the phone did you also tell them that "We also have for you some skin or chicken feet"?

A. Never did.

Q. So that when they came to the place they had no idea that they were going home with chicken feet, is that right?

A. They had no idea, no, sir.

The Court: Listen, you are saying "We have no idea."

The Witness: Well, I say I had no idea.

The Court: That is what I thought.

Q. Did you do the phoning to the customers?

A. No, sir.

[fol. 248] Q. At any rate, when they came there that day alongside of the railroad siding as well as the turkeys you had on hand, chicken feet and chicken skin—is that right?

A. We had some on hand, yes, sir.

Q. And how long had it been up there at Tenth Avenue alongside of the siding. Had it been there for weeks or had it been brought up there to be ready for the arrival of the train from Buffalo?

A. Well, I do not follow you.

Q. The chicken skin and feet.

A. Oh, the chicken feet and skin?

Q. Yes. Had it been up there for weeks in advance?

A. No.

Q. When was it brought up?

A. We took out a few—a little each day so as to keep on selling it and moving it out.

Q. Do I understand then that the skin and feet that were sold that day with the turkeys had been taken out of some icebox there that day or the day before?

A. They might have been out of the freezer; they might have been taken out of the freezer.

Q. Where is the freezer?

A. Well, some were taken out of the Manhattan freezer. That would be about two blocks away.

The Court: What is that, a storage warehouse?

The Witness: Yes, sir, that would be a storage warehouse, as a freezer, yes, sir.

A. (Continuing:) And then there is one at Jersey City that would be about an hour or an hour and a half away. That is the Union Terminal.

Q. Is that your recollection, that some feet and skin was taken out of each of those places to be on hand that [fol. 249] day for the arrival of the train?

A. No, sir; took some out every day.

Q. By the way, when you finished the sale of all the turkeys that were in that train that came from Denver, at the end of the day did you have any feet left or skin left?

A. We had very little left.

Q. As a matter of fact don't you know it was all gone?

A. No, it wasn't all gone. We had very little left.

Q. Well, how many pounds would you say of skin were left and how many pounds of feet?

A. Well, I don't think we had any more skin left but we had very little feet left.

Q. The skin was all gone?

A. Yes.

Q. And how many feet were left?

A. Maybe about two or three or maybe five barrels—maybe more. I wouldn't remember because after I finished the rationing of the—what do you call it, the turkeys—

Q. Well, do you remember what you did with these—

The Court: What were you going to say, after you finished the rationing?

The Witness: I tried to get away as soon as I could because I was very tired. I was up at four o'clock that morning and this was about five in the evening, so I tried to get away.

The Court: You gave a fast glance, I suppose, at what remained?

The Witness: I just gave a rough look around—around about four or five barrels.

The Court: To see what kind of a day you had?

The Witness: Yes.



Q. Have you any idea what happened to the four or five barrels of chicken feet that were left over?

A. Oh, I wouldn't know what happened to it the next day.  
[fol. 250] Q. Do you know whether they were returned to the freezer that night?

A. No, I do not think so.

Q. It is a bad idea to leave them exposed?

A. Well, they were in our cooler.

Q. You have a cooler at 20 Tenth Avenue?

A. Yes.

Q. Do you know whether those five barrels were put back in the cooler that night?

A. It was already in the cooler. It was set there.

Q. I get it. So far as you know, it stood there until the following day, is that right?

A. That is right.

Mr. McAuley: That is all.

Mr. Sahn: No further questions.

(Adjourned until May 25, 1944, at 10:30 A.M.)

New York, May 25, 1944, 10:30 A. M.

Trial resumed.

Mr. McAuley: The last witness will be here a little late, your Honor. I have one or two more questions to ask him.

Mr. Sahn: Mr. Higgins.

JOHN P. HIGGINS, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sahn:

Q. Mr. Higgins, what is your business?

A. I am connected with George A. Hormel & Company, meat packers.

Q. And where is that company located?

A. Austin, Minnesota.

Q. And they process meat and sell it to wholesalers?

A. That is right, they do.

[fol. 251] Q. Do you know the defendant Max Kraus?

A. I do.

Q. Do you know the defendant corporation M. Kraus & Brothers, Inc.?

A. I do.

Q. How long have you known these defendants?

A. Five years.

Q. Have you done business with the defendants?

A. Yes.

Q. Does your company ship cars of beef to M. Kraus & Brothers, Inc.?

A. They do.

Q. Does your company ship to other dealers in New York City?

A. Yes.

Q. Have you been shipping to M. Kraus & Brothers, Inc., within the past few weeks?

Mr. McAuley: I object to this line of questioning.

The Court: I will allow it.

A. We have.

The Court: Is that correct—you are going to connect it up?

Mr. Sahn: Yes.

Q. What determines to whom you shall ship your meat to?

A. Under present conditions the character of the person to whom we sell.

Q. When you say the character of the person to whom you sell, can you be a little bit more explicit than that?

A. To see that the merchandise we sell to the particular distributor gets into the proper distributive channels legitimately.

Q. Legitimate channels?

A. Yes.

Q. To see that it stays out of black market?

A. That is right.

[fol. 252] Q. How often have you seen the defendant Max Kraus within the past few years?

A. Several times a week.

Q. Several times each week?

A. Yes.

Q. Do you meet and mingle with people who do business with Mr. Kraus?

A. I do.

Q. And do you meet and mingle with people who do business with his corporation?

A. I do.

Q. Can you tell us what Mr. Kraus's reputation is in the general poultry and meat community in the Washington Market?

A. It is above reproach.

Q. For truth and veracity?

A. Yes.

Q. What is it?

A. Excellent.

Q. Excellent. And can you tell us what his reputation among the dealers in the industry is for adherence to Federal, State and local laws, including such regulations as the OPA regulations?

A. I don't get that.

Q. (Question read.)

A. Well, can I put it in my own way?

Q. You can.

A. I have never heard of any black market violations through M. Kraus and Brothers.

Q. Do you know what his reputation is along that line?

A. Yes.

Q. What is it?

A. Excellent.

Mr. Sahn: That is all.

Cross-examination.

By Mr. McAuley:

Q. Mr. Higgins, if for a fact it was shown to you that the defendant corporation and the defendant individually were making tie-in sales in the current market, would that alter your opinion?

A. Well, to begin with, Mr. District Attorney, I don't know what a tie-in sale is.

Q. Well, you are familiar with the fact that it is rumored that in order to get rye liquor dealers have to buy rum. You [fol. 253] never heard of that?

A. As hearsay I have heard that, yes.

Q. And to get onions you have to buy spinach?

A. Yes.

Q. And to get spinach you have to buy celery?

A. I heard that, yes.

Q. Well, that is what I am talking about. If we prove to your satisfaction that the defendant individually and

the defendant corporation were compelling retail butchers to buy relatively worthless products: chicken skins or chicken feet, in order to get turkeys, would that alter in any respect your opinion of the defendant, or do you approve of such sales?

A. No, I don't approve of such things but as I say again, I do not know what a tie-in sale is.

Q. Well, if in order to buy turkey I have to buy chicken skins that I don't want, so that the total of the price I pay for the chicken skins plus the ceiling price I pay for the turkey gives the butcher an over-the-ceiling net profit, would that alter your opinion?

A. If I may put it this way, I am in the meat business. I see what goes on every day. I cannot understand how somebody can say they have to buy something in order to get what they want.

Q. Well, I am not asking you that.

The Court: Why don't you understand that. What is difficult about understanding that?

The Witness: Well, the point is, your Honor, that I can't understand how you can force a man into buying something against his will.

The Court: No?

The Witness: No.

The Court: Any more questions?

[fol. 254] Mr. McAuley: That is all.

Mr. Sahn: That is all.

The Court: What do you sell the defendant, chicken skins?

The Witness: No.

The Court: What?

The Witness: Meat products, lamb, veal and beef.

The Court: All right.

JOHN Q. ADAMS, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sahn:

Q. Mr. Adams, what is your business?

A. I am in the cold storage warehouse business.

Q. With what company?

A. The Manhattan Refrigerating Company and subsidiaries.

Q. And what office do you hold in that company?

A. Vice president.

Q. How long have you been connected with the Manhattan Refrigerator Company?

A. Twenty years.

Q. Do you know the defendant Max Kraus?

A. Yes, I do.

Q. Do you know of the defendant corporation ~~Max~~ Kraus & Brothers, Inc.?

A. Yes, I do.

Q. How long have you known the defendant Max Kraus?

A. Twenty years.

Q. How often have you seen him during that length of time?

A. Many times each week.

Q. And do you come in contact with other dealers and business men in the community who deal with Max Kraus?

A. I do.

[fol. 255] Q. Under what circumstances have you met Max Kraus?

A. Well, under the circumstances of doing business with him for twenty years; under the circumstances in the capacity of president of the Marketmen's Association of the Port of New York, which has to do with poultry and meat industries; under the circumstances of being active or ex-officio chairman of the poultry and meat committee, and in a personal way, knowing his sons and his wife and his business organization.

Q. Can you tell us or do you know, rather, what Mr. Kraus's reputation is in the community for truth and veracity?

A. It is splendid.

Q. Can you tell us what his reputation among the dealers in the industry is for adherence to Federal, State and local laws and regulations, including the Office of Price Administration regulations?

A. I say he had a good reputation.

Mr. Sahn: You may examine.

## Cross-examination.

By Mr. McAuley:

Q. Mr. Adams, the defendant is a tenant of yours or a client or a customer?

A. In a certain way I would say he is a customer of Pipe Refrigerator Lines for meats.

Q. Does he pay storage to you for his meats and poultry?

A. Yes, sir.

Mr. McAuley: That is all.

[fol. 256] WILLIAM C. HAASE, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

## Direct examination.

By Mr. Sahn:

Q. What is your business, Mr. Haase?

A. Sir?

Q. What is your business?

A. I am sales executive in charge of sales and distribution of beef, lamb and veal for Swift & Company on the Eastern seaboard.

Q. What territory of the Eastern seaboard? Just what territory does the Eastern seaboard cover?

A. It takes in all of the five New England States, down to the North Carolina border, Pittsburgh on the west and Buffalo on the other end.

Q. Do you know the defendant Max Kraus?

A. Sir?

Q. Do you know the defendant Max Kraus?

A. Yes.

Q. Do you know the defendant M. Kraus & Brothers, Inc., the firm of M. Kraus & Brothers, Inc.?

A. Yes.

Q. How long have you known Max Kraus?

A. Eleven years.

Q. Does your firm do business with Mr. Kraus & Brothers, Inc.?

A. Yes, sir.

Q. How long have you done business with that firm?

A. I have done business, representing my firm, for eleven years, and Swift & Company as a company have done it for longer years than that.

Q. Does Swift & Company ship cars of beef or veal or lamb to M. Kraus & Brothers today?

A. Yes, sir.

Q. Do they ship cars of beef, veal or lamb to other dealers in New York today?

A. Yes.

Q. Can you tell us what determines the policy of your company as to whom they shall ship beef or veal to?

[fol. 257] Mr. McAuley: I object to that. I do not think the particular policy of his company is of any importance here if he is a character witness.

The Court: I will allow it.

Q. (Question read.)

A. Well, we ship beef, lamb and veal to Max Kraus and other customers in New York, not as a matter of policy, but because they are customers.

Q. Do you know the dealers in New York City who do business with Max Kraus?

A. Well, I can't say that I know dealers in New York City that do business with him by name. I have met, in passing, and seen a lot of dealers in New York City who are in his place of business from time to time as I come to visit his place of business.

Q. Do you know what Mr. Kraus's reputation is in the community for truth and veracity?

A. I would say good.

Q. Do you know what his reputation is in the business for adherence to Federal, State and local laws, and particularly for adherence to the Office of Rice Administration regulations?

A. So far as beef, lamb and veal is concerned, he is living up to our best knowledge and belief to the letter of the law.

Mr. Sahn: You may cross-examine.

Cross-examination.

By Mr. McAuley:

Q. If it were proved, Mr. Witness, to your satisfaction that M. Kraus & Brothers, Inc., and M. Kraus individually—



The Court: I could never see the sense of those questions put to a character witness. I suppose it isn't my business to interrupt, but do you think it is important? I suppose [fol. 258] that any character witness, if he were shown that a man was a murderer, would say that he believed he was a murderer, but does that have anything to do with the organization?

Mr. McAuley: I do not know, your Honor. In this type of case I expect that possibly I might get a different answer than I would in a homicide case, and that is what I am waiting for.

The Court: I think the homicide illustration is an unfortunate one. I am talking about anything. Testifying to reputation, that is the only thing he has testified to, and I think you ought to cross-examine on it. I know a lot of judges admit it.

Q. Is the reputation that you testified to, is that founded upon what you hear any of the general public say of Max Kraus or of the corporation, or what you hear retail, small local butchershop people say?

A. My testimony is given on behalf of what Swift & Company and I as their representative know of Mr. Kraus, his business operations in that part of the business which we are interested in, and—

The Court: You do not know whether any of your customers violate a law or not, do you?

The Witness: No, sir.

The Court: You do not send out spotters or investigators?

The Witness: No.

The Court: You take them on faith. Is that what you wanted to know?

Mr. McAuley: Yes.

Q. Is that correct?

A. Yes.

Mr. McAuley: That is all.

[Tol. 259] JEROME A. THIRSK, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sahn:

Q. What is your business, Mr. Thirsk?

A. I am a vice-president of the Sterling National Bank.

Q. How long have you been connected with that bank?

A. A little over four years.

Q. Do you know the defendant Max Kraus?

A. I know him very well, intimately.

Q. How long have you known him?

A. Ten years.

Q. Do you deal with other people in the community in the meat and poultry business?

A. We do.

Q. Have you had occasion to observe what his reputation is in the community?

A. It would be very vital to me to do so.

Q. Can you tell us what his reputation is in the community for truth and veracity?

A. I know of no one with a better reputation.

Mr. Sahn: You may examine.

Cross-examination.

By Mr. McAuley:

Q. As a banker your credit reliance is upon the man who testified before you, the houses who sell products to Kraus & Brothers, Inc., is that right?

A. Well, it would take a book or an hour to cover that feature of credit.

Q. Well, can't you cover it? Don't you check, as a banker, Mr. Kraus, to see from whom he buys, if he pays his bills promptly?

A. That is right.

Q. You do not go up to a local butcher in Yorkville to whom Mr. Kraus sells?

A. I do not.

[fol. 260] Mr. McAuley: That is all.

Mr. Sahn: That is all.

(Witness excused.)

Mr. Sahn: Mr. Douglas.

HUGH DOUGLAS, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sahn:

Q. What is your business, Mr. Douglas?

A. Superintendent of the Cudahy Packing Company.

Q. And where is your office?

A. 450 West 14th Street.

Q. In New York City?

A. New York City.

Q. Do you know the defendant, Max Kraus?

A. The past thirty years.

Q. Have you done business with him since that time?

A. Yes, sir.

Q. Have you done business with M. Kraus & Brothers, Inc.?

A. What is that?

Q. Have you done business with the firm of M. Kraus & Brothers, Inc., the corporation?

A. Oh, yes, yes.

Q. How often have you seen Max Kraus in the last few years?

A. Well, pretty nearly every day.

Q. And you are generally around the market on 14th Street and Tenth Avenue pretty nearly every day?

A. Yes, pretty nearly every day.

Q. And you come in contact with various dealers in the trade?

A. Yes.

Q. Have you had occasion during this period of time to observe the character and reputation of this defendant?

A. I have.

Q. Can you tell us what Mr. Kraus's reputation in the community is for truth and veracity?

A. The very best.

[fol. 261] Q. Very best. Can you tell us what his reputation is and the reputation of the corporation among the dealers in the industry for adherence to federal, state and local laws, and to Office of Price Administration regulations?

A. Well, very, very good.

Mr. Sahn: You may examine.

Cross-examination.

By Mr. McAuley:

Q. Mr.—what is the name?

A. Douglas.

Q. Mr. Douglas, I am interested in asking you one question: Are the federal, state and any other regulations a common source of conversation among the people on whom you base the reputation of the defendant; do you talk a lot about the law?

A. Yes. I have on occasion, on numerous times, sent some of our trade down there to get merchandise and all based on the OPA prices, the same as our own.

Q. I believe—let me state myself clearly. I believe you were asked by Mr. Sahn whether you had a chance to observe the reputation of the defendant, his reputation for adherence to federal, state and any other type of regulations governing the butcher trade. I ask you, is it a fact that those people on whose comments you have learned the reputation of the defendant, that they spend quite a bit of time discussing the law?

A. Time discussing it? Well, I wouldn't know that. I know they come in and out and come in our place and buy, I never heard them complain about paying, only the regular legal prices.

Q. As things go, is M. Kraus & Brothers, Inc., reckoned a pretty good account by your firm?

A. The highest, the best.

[fol: 262] Q. I mean is it a good customer? They buy in quite a bit of volume?

A. Oh, I would say from us alone over a million dollars worth a year.

Mr. McAuley: That is all.

Redirect examination.

By Mr. Sahn:

Q. You have no trouble in disposing of your merchandise today, do you?

A. No what?

Q. You have no trouble in finding customers today?

A. Oh, no. We have more customers than we have merchandise.

Mr. Sahn: That is all.

(Witness excused.)

Mr. Sahn: Defendants rest.

Mr. McAuley: How about the witness, Mr. Lotto?

(Colloquy between Mr. Sahn and Mr. McAuley off the record.)

Mr. McAuley: Your Honor, Mr. Sahn informed me that the last witness on the stand yesterday would be here at 11:15. He thought his witnesses that he put on the stand today would take until that time.

Mr. Sahn: Mr. McAuley yesterday, after the witness was excused and after the court adjourned for the night asked me if I would produce Mr. Lotto this morning, and Mr. Lotto told Mr. McAuley he had some poultry in and he would be here about 11:15, and we both thought that that would be all right and told him to come down at that hour.

The Court: Does that mean 11:15?

[fol. 263] Mr. Sahn: Well, I can call his office and check on it. It doesn't take more than 15 minutes to come down here. I can call him now.

The Court: All right, go ahead.

Mr. Sahn: Thank you.

(Short recess.)

The Court: Do you want to wait for him?

Mr. McAuley: No, I will let it go.

The Court: Any other witnesses?

Mr. McAuley: No, that is all.

The Court: Both sides rest?

Mr. McAuley: Yes.

Mr. Sahn: Yes.

The Court: I suppose you renew all your motions, and I will make the same rulings.

Mr. Sahn: Sir?

The Court: I suppose you renew all your motions and I will make the same rulings.

Mr. Sahn: Except I should like——

The Court: Do you want the jury excused?

Mr. Sahu: Yes, I would like to have the jury excused.

(Whereupon the jury was excused at 11:00 A. M.)

#### MOTIONS TO DISMISS

Mr. Sahn: Aside from grounds for dismissal raised at the close of the government's case I move to dismiss the informations generally on the further ground that there is no statement in any count of the informations that the combined prices of the two articles purchased exceeded the maximum base price set up by Regulation 269. The federal courts have held that any omission from an indictment of any facts or circumstance necessary to constitute an offense cannot be supplied by intendment or implication, and a charge must be made directly and not inferentially or by way of recital. We don't know from the information what [fol. 264] the combined prices of the two articles are. If the combined prices of the two articles do not exceed the maximum price set up by the regulation, there cannot be a crime and the fact that they may have been exceeded cannot be inferred even by testimony, even after a trial.

The Court: I will deny that motion.

Mr. Sahn: I move further to dismiss Count 1 of the information against the individual and the corporation on the ground that the individual mentioned in the information was not the individual to whom the merchandise was sold, in accordance with the testimony and the exhibits, and that therefore these defendants are placed in the position of double jeopardy for at some future time the real purchaser of the merchandise, the man to whom the merchandise was billed, may make a similar complaint against the same defendant.

The Court: Denied.

Mr. Sahn: Exception.

The Court: That is Mandel you are speaking of?

Mr. Sahn: That is both Moskowitz—count 1 in the first information and count 2 in the second information—it applies to both—Moskowitz and Mandel.

The Court: All right.

Mr. Sahn: Exception.

The Court: Is that all?

Mr. Sahn: That is all.

The Court: How about this Braverman? You have three counts for Braverman. My notes on him are very sketchy. Were the three of them sold all at once? There was just one deal with him, wasn't there?

Mr. Sahn: Braverman testified that he came down in the morning.

The Court: At 7:00 o'clock.

[fol. 265] Mr. Sahn: And he got a barrel of chickens and he had to run back to his place. Then he came down later and got some more chickens and he said that he took 5 pounds of chicken feet each time he took a barrel.

Mr. McAuley: Three separate sales on the one day.

Mr. Sahn: Three separate sales.

Mr. McAuley: On the one day.

The Court: All right. I just wanted to make sure. How long do you want to sum up?

Mr. Sahn: I want at least an hour.

The Court: An hour?

Mr. Sahn: Yes.

The Court: How long do you want?

Mr. McAuley: Fifteen minutes.

The Court: Well if you are going to take an hour we might take a short recess now.

(Short recess.)

(Whereupon the jury returned to the courtroom at 11:10 A. M.)

(Mr. Sahn summed up to the jury on behalf of the defendants at 11:10 A. M.)

(Mr. McAuley began his summation to the jury on behalf of the government at 12:00 noon as follows):

#### SUMMATION TO JURY

Mr. McAuley: If your Honor please, ladies and gentlemen of the jury, if the eight men and the four ladies who sit on this jury were boys and girls of twelve, innocent, naive, with no sense of humor at all, and we were unaware of what is going on in this country today, I might have some fear for the effect of the one-hour talk you have listened to. But I know that you are not twelve, and I marvel at counsel's ability to keep a straight face and to say to you, men and women, grown up and intelligent,



[fol. 266] some of the things that he has said. I marvel at him. It really is a matter of astonishment to me.

I will go further and say this, that a moment ago when he said that yesterday I quoted the price of chicken feet at 5 to 10 cents a pound, I personally doubt that that is a mistake of memory. I think counsel knows that I said 3 to 5 cents because I said it five times, and I referred to the top price of 5 cents. I do not think counsel has any doubt in his own mind that I said 3 to 5 cents. I did not say 5 to 10 cents. He is trying to pull the price up somewhere near to show what was on the invoice. Now that is the first thing I want to say to this jury, because this is not going to be a summation in the usual sense of the word. I am scarcely going to comment on the case at all because I feel you know it as well, if not better than I do, or anybody else in this court, and today what counsel has just done, to me would be futile because I do not think what he has done is going to be effective at all. If this defendant—and I say again, he is a black market operator. If he and the defendant corporation are convicted, as I confidently expect they will be convicted, I make this prediction: that somewhere in the future there is going to — recrimination against some attorney—I don't know who that attorney is but I would wager my bottom dollar that months from now some attorney is going to be blamed for advising a client that this was a clever way to get around the statute. Mark my words if that doesn't happen! Somewhere, sometime, someone advised this defendant that the way to beat the ceiling price was to sell something that had some value, on appearance anyway. Of course you wouldn't sell them a stove along with a turkey. That would be too ridiculous. But you know as well as I do what is going on these days. We know that many resort to the obvious and crude [fol. 267] and difficult-to-prove method. You give a check for the ceiling price and cash on the side. That is the simplest and most obvious. You also know that others come in and say, "I'll bet you \$200 I can deliver five cases of scotch by four o'clock." And the wise customer says, "I'll bet you \$200 you can't." And the bet is lost and the scotch is there. You are not fools. I consider the summation that was addressed to you an insult to your intelligence, and I hope that you do too, because it treats you as little children who do not know what is going on,

just too simple to know, as if you had never heard of the word "graft" in your life, and never heard distinctions between so-called legitimate and legal graft and so-called illegitimate or illegal graft. I say to you, and I confidently expect the Court to charge you, that whoever it was that suggested this to this defendant and anybody else who may be doing what he is doing, that this would be a successful way of beating this law, that the case could never be proved—I say I confidently expect the Court to charge you that that is not so; that the acts which the government has presented here are violations of the law, and that the laws cannot be beaten that way, and that it is not the business of Mr. Kraus or his corporation in the slightest way, to be instrumental in setting up people in a new business in which they had no prior experience and say to them, "If you want turkeys, we'll see if you cannot develop a nice chicken feet market. I know you never tried it before but go ahead, you might sell some."

That is not his business. That robs them of their freedom of choice. It robs them of their independence. It robs them of their right to decide whether they want to sell turkeys and turkeys only, or whether they want to [fol. 268] sell turkeys and open up a branch business in chicken feet. Again I say to you I marvel at counsel's ability to address you as he did. He must have forgotten my opening remarks in which I told you ahead of time that the government was going to have difficulty with most of its witnesses, and that isn't hard for you to understand why. Yet difficult as it was I think they told you enough of the essential things to be a legal ground for a conviction in this case.

It has been an astounding case in many ways. You learned that up until this very week most of these butchers are dealing with the defendant. I have learned another thing, too, that the policy of looking upon the butcher as a poor, simple law-abiding person, anxious to do his best is perhaps not the best policy. I have come to that conclusion, too, although it is a hard thing to say because there is nothing so strong as the law of self-preservation, nothing quite so strong. And it is also very hard to ask a man who has been a butcher for twenty years to take up plumbing. You know that as well as I. But this man, with his big balance in the Sterling National Bank, or wherever it is, and with his contacts with Cudahy—and don't for a minute

believe that the big companies are not guilty of the same practices as my adversary so sweetly assured you. These big companies would never be guilty of tie-in sales! Well, this isn't the time or the place to try the big companies, but that may come yet. There is a lot of san-timonious, Uriah Heepish goings-on today—Holier than Thou! Sure, the defendant volunteered to serve on OPA committees with the left hand, and behind the back peddles chicken feet. Hypocrisy! That is what it is, and there is a lot of it. We know there hasn't been any perfect solution offered by anybody yet. We know the OPA is not without fault, [fol. 269] and we can not find everybody yet—probably won't—we know there will probably be a lot of illegitimate war-time millionaires. You know that as well as I do. I have been careful, at least to the best of my ability to get those who I though were in on the racket—it is prevalent not only in this business but many businesses. So I place my reliance in this case—and I am not even going to talk about it—you know more than I do about it. You have seen it as clear as a b c. My eldest daughter of eight could understand it, I think.

I will say this, in behalf of the government, that I place my reliance in this case upon a jury of average men and women. I am not going to pull out a handkerchief and have you cry and tell you about a lot of poor people who aren't making big money this year or last year, who couldn't afford turkey. They will take that and get along with what they have to eat. These people are not going to starve because they did not have turkey, but there are a lot of people who are hard up in this world, and you know that and I know that. They are on steady salaries. They are not making any of the gravy—and there is plenty of gravy made. You just have to look at the racetrack totals to know that. You have many people who think nothing about betting \$5,000 or \$7,000 or \$9,000 a day at the racetrack. That has happened. You and I know there is more cash floating around in the pockets today than ever before. What do we know? Because counsel tells us—and he is not here to testify—that his clients' dealings in beef and lamb are above reproach, that is not evidence in this case. We don't accuse him of doing that with beef and lamb. If we find out we may do something. All we know is what he is doing in chickens and turkeys, and that is all we are interested in today. So I place my reliance upon you to

[fol. 270] bring in a verdict in this case. Counsel must be fearful—he must be concerned, I say,—and any defense lawyer must be when he starts to tell a jury about a jail sentence for his defendant. That is none of your business, none of mine, that is, the jail sentence involved. And he takes together all five counts. The maximum for each count in this court on this charge is one year in jail and a \$1,000 fine, one year in jail and a \$1,000 fine. Counsel knows that, and I am surprised that he does not know that you know that. First offenders and even second offenders and sometimes third offenders are never sentenced to the maximum on each and every count. And what has he done? He has resorted to the shabbiest trick of a lawyer, to hold out before you five years. He knows his client hasn't a chance of getting five years—even from the toughest judge that ever sat on any bench. And yet he has pulled that out of his pocket to try to disturb or scare you people. Well I hope you won't be so easily tricked. I think that is an affront to your intelligence, too. Five years! Don't send this poor big butcher to jail for five years!

It won't be five years. It is more apt to be six months, I will tell you that right now if he is convicted.

Now, where are we so far as the date of these informations are concerned? I would like to say a few words about counsel's comments there because he is not fooling you nor is he fooling me. One of these informations names only the corporation, and in spite of counsel's pretended innocence and ignorance, he knows very well—and I think most of you, too, although you are not lawyers, know why the corporation is named in those counts. It is because the witnesses in their affidavits said that their dealings were with some \$25 or \$30 or \$40 a week clerk. They were not waited on by the boss, and as far as they know the [fol. 271] boss was not aware of that. I question that, too. But I am coming to that in a second. But that is why in this information only the corporation is named. Nothing puzzling at all about it; as simple as a b c.

In this other information, which also has six counts, the boss's name appears, because affidavits were given to the OPA and to this office of the United States District Attorney in which it was said that Max Kraus either was there, officiated, attended or was aware of the sales.

The Court: I will allow that as an explanation to the jury which apparently you consider necessary with regard to Max Kraus's knowledge but I instruct the jury now that as a statement of fact the contents of those statements, if they were made, are not before you as the District Attorney's statement as to what they contain is not to be considered by any of you.

Mr. McAuley: Yes, your Honor.

So that we have in this information five counts—and with the Judge's comment I will close on that point, again saying this, that I do not think counsel was sincere with his pretended ignorance of why one information is as it is and the other information is as it is.

Now, I promised you there would be no flag-waving. I told you in the beginning the kind of a case the government was going to present, and I think and I hope that the government has succeeded in face of the overwhelming obstacles that it faced. I hope that enough legal evidence has been presented to you on which you can come to a conclusion that the charges made by the government are true beyond a reasonable doubt, and I hope that the Court will rule that the evidence presented is legally sufficient, because this has not been an easy case for the government to try. So I say if on the facts which have been presented you are convinced beyond the usual, reasonable doubt—and remember, you can judge sometimes more from circumstances and atmosphere than you can from a lot of direct testimony. If I see you do something you should not do, and you know that I saw you, and I don't report it as perhaps I should, and then I come around because insurance selling is my business and I say "How about a \$5,000 insurance policy," and I kind of wink, and you buy it, you are under compulsion. I think that is demanding and requiring even though I do not even say so. I think that that is perhaps what you are going to be told. I think that is the picture that you heard here. I do not think you are going to be misled by counsel's pressing on those words "demanding," "compelling" and "requiring." Nor do I think for one moment that there is any danger that you believe that the people who testified here voluntarily—I will take his word—that is the word he used—"voluntarily" bought those chicken feet and chicken skin. I say if for one minute you think that is so



come back in five minutes with an acquittal for the defendant and the corporation. Don't lose time. Counsel gave us the cue. "Voluntarily" he said they bought them; but if you believe that don't waste time, your own or mine or anybody's before rushing in here with an acquittal. Don't forget one nice little tiny clue that I think is in this case on that point. How was it that good old Moskowitz who bought—how is it that Moskowitz bought the \$146.20 worth of toms and 4 more boxes at \$142 and 3 boxes of chickens at \$69.42 for a grand total of \$358.59—how is it that he, like little Beaverman—how is it that he was let off with just a dollar's worth of chicken feet? How is it [fol. 273] that Moskowitz got soaked for \$64.05? And if you study these invoices you will find that that is the story all the way through, down the line, on the barrelhead. "If you want your turkeys, there is your chicken feet."

That is all, your Honor.

#### CHARGE OF THE COURT

(CLANCY, J.)

The Court: Members of the jury, the addresses of the two attorneys have brought a number of irrelevant issues into this case, and I warn you again that of course your findings are to be found entirely on the testimony of the witnesses and the exhibits. Statements of fact made by the attorneys either in the course of the trial or today in their closing summations; or statements of fact made by me—and I intend to make some in the course of this charge—if they are not in accord with your recollection of the evidence in the case, are to be ignored by you and not accepted. You will make up your minds solely and wholly on what you find the testimony to be. You are not to consider the penalty or the possible penalty in this case. Both lawyers in my opinion, should not have told you about it. Possibly the United States Attorney felt called upon to do so by the defense counsel's statement.

I am called a judge in this case, but the business of the man who is called a judge is over when I finish instructing you. The common understanding of judge is a man who decides things. But you decide this case. I do not

decide it. I rule on the evidence. I see that you get only the proper evidence, and that is my whole function. [fol. 274] You are the ones that are to judge the case, and you are to do that not from any extraneous consideration such as the penalty, because that is none of the jury's business. It has nothing to do with justice. You exercise the prerogative of doing justice between the two contenders in this case. You have nothing to do with the penalty. That is entirely up to me." Please do not consider it. As I said, that is none of the jury's business.

There was a complaint made that I excluded evidence or something that could have been proved. The law of evidence excludes all claptrap and poppycock. Anything else is admissible. The best illustrations I can give is right before you as a jury, where I first excluded one butcher from talking about his sales of chicken feet, and because subsequent testimony made an issue of what he was going to testify to, if you will remember, I allowed him to be recalled to testify. I have excluded no evidence but I have excluded all claptrap; that is why I am here, to exclude that. You are not to assume that any injustice has been done anybody because I did not do any injustice. While I am on that, you may not draw any conclusions from the way I rule as to what opinion I have on the case. Even if you detect an opinion you are not to find any judgment on it. You are to conceive your own opinion. In fact you are to conceive your own judgment; you are to formulate a solid, independent rational judgment, and not an opinion, so don't worry about any opinion of mine.

Now I am going to give you the law, and in the course of it I am going to talk about the defendants. You cannot charge a jury on the law of crime without using sentences that are condemnatory of it. I am leaving the case entirely to you in the best and most honest spirit. I dis-[fol. 275] charge my duty when I finish, and the duty and obligation of finding the defendants either guilty or innocent is wholly in your lap. I am going to give you the law, and that is something that I as a judge and as a citizen am very much interested in. It reaches the pocketbook of everybody. It has reached your pocketbook, it has caused you difficulties. I am talking about price regulation. In my opinion it is the most important law on the books. What degree of public support it has received I do not know, that is, I would not really vouchsafe anything, that



sounds like an opinion. Your judgment of it is just as good as mine, but it is the duty of a jury to enforce it if and when they find that the law has been breached. It is an unpopular law, just as any law is that affects your daily lives. It has prevented you from enjoying many of the elegant things of life, maybe sometimes necessities, but the purpose of the law is wholly good, without it a dollar might not be worth a dollar; certainly its value would be terrifically reduced. The poor people would not be able to buy anything because prices would go so high. I think it is the obligation of every jury to hold it sacred even though it has hurt you, and some of you may disapprove of it. When you go into your jury room some of you may say, "Well, the Price Administration has made mistakes." I agree with you. Some of them may have been stupendous. I still agree with you. The law has been held constitutional by the Supreme Court, so whether you think it is constitutional or not you are not to consider it, you are to accept it. I do not care what criticism can be made of it, it is still a good law, and you must enforce it if you find it has been breached.

Coming down to the general instructions in criminal cases: the informations are not proof. An information is [fol. 276] a pleading drawn up by the United States Attorney—have you copies of those?

Mr. McAuley: Yes.

The Court: I am going to give you copies of the information. Have you any objection to that, Mr. Sahn?

Mr. Sahn: No objection, your Honor.

The Court: And I instruct you that they have no probative value at all. The only reason I am giving them to you is because there are numerous counts, and it will save a great deal of time in having your discussion and consideration of the case because you can follow them through, one after the other, with the names and the dates regarding the persons in the dealings with whom the defendants are said to have violated this law. That is the only reason I am giving them to you. That is the only effect it has. Please do not consider it proof of anything. It is merely drawn up by the United States Attorney, to begin with. In the second place, these defendants, both the corporation and Mr. Kraus himself, come into court attended by a presumption of innocence. That presumption remains with

both of them until you are convinced beyond a reasonable doubt of the guilt of either or both. When you are convinced beyond a reasonable doubt that presumption has failed and you need consider that no longer.

The obligation of the Government is to prove this case beyond a reasonable doubt. That means it has to prove every element of the crime, as I am shortly going to give it to you, beyond a reasonable doubt.

"Beyond a reasonable doubt" is a self-defining statement. It is a doubt or hesitation in accepting or giving credence to the happening of an event, and it is one that appeals to a person's reason and not to his imagination. For instance, you are in the jurybox because you are average, intelligent people. If it is the kind of a doubt [fol. 277] that would motivate you to do something or not to do something, then you have a reasonable doubt; otherwise it is not. Nothing is a reasonable doubt unless it satisfies your reason. The Government has to relieve you of any doubt that satisfies your reason, and that is its obligation.

In coming to your conclusions you must determine the credibility of the witnesses. I think every witness in this case may very well be said to be interested witnesses, including the character witnesses.

Mandel, one of the Government witnesses, testified, and the defense attorney has given you the possible reason why he might be moved to testify against the defendant. All the rest of them had apparent reasons why they favored the defendant. I do not know of any others that would have. I am not talking about Schubert, whose testimony I regard as irrelevant. All of the defense witnesses are, of course, interested. Nathan Lotto is a present employee of the defendant, and has been all his life. I think that the jury might regard everybody in the case as interested. But that does not mean that you do not have to believe a witness. That is a factor you use in determining whether or not you believe a witness and to what extent you believe him. That is what lawyers call the weight that you give it, the extent to which you believe it.

If you find that any witnesses testified falsely in a material item or particular of their testimony then it is the right of any juror to disregard all of the testimony of those witnesses and refuse to accept any of it, or you may accept

so much of it as appeals to you as true, and disregard what you think is false.

Character witnesses have appeared here. This is the law with regard to character witnesses—what they really [fol. 278] give you, of course, is reputation. You must, first of all, believe what they are testifying. Then you must consider, if you believe it, with all the other evidence in the case, and if you considered with all the other evidence in the case you find that it is so strong that it contradicts the positive or the circumstantial evidence in the case, then you may have a reasonable doubt. If you do, of course you have to give the benefit of any reasonable doubt in the case to the defendants.

Evidence is direct and circumstantial. There is direct evidence in this case. Mandel's, for instance, is all direct evidence. The other witnesses testified to buying skin and feet, that they had no use for it except some of them had use of an occasional pound—that is all direct evidence. Then everything that is evidence in the case, that is, testimony in the case, is circumstantial evidence. Circumstantial evidence is such evidence as to prove the existence of one fact in question by proving the existence of one or more facts from which the existence of the first fact may be derived as a logical conclusion. Jurors are sometimes afraid of it, or so they say they are, but it is nothing to be afraid of. It is just as good and sometimes even better than direct evidence, because it is unconscious. You take the testimony of Zweben. He said "Yes, I was willing to take the chicken feet" or the skin, whichever he bought. "This defendant was doing me a favor when he sold me turkeys. I think that I ought to pay for it. I see nothing wrong about it."

Now that of course is no direct evidence of anything. The man is testifying to his state of mind, but you may accept that as circumstantial evidence of what had transpired in effecting his sale. Ordinarily a jury is detecting a state of mind from facts, but there you may use that [fol. 279] circumstantial evidence to determine a fact from the resulting state of mind.

You take the defendant's testimony on the stand. He was at one time rather vociferous. He said he would like to have all the chicken feet he could get, that he had an order for a carload of it from soup company, as I remember it. He also said the skin was used by salami manu-

facturers and fat renderers. I do not know that that was particularly relevant to any issue as direct testimony, but you consider that as circumstantial evidence. He is a butcher and he knows the business. He says he keeps his hand on everything in the store. A wholesaler has to know what the retail store wants, and that is the best explanation that he could give you. Maybe it was an unconscious one, too, about the uses to which chicken skin can be put. How much of it would you have to buy in order to render out a pound and sell at 85 cents a pound, that is, of fat than can sell for 85 cents? Do they make salami at home? I don't know. Is he selling it by the carload, and was he stuck with a carload? I don't know. I am just showing you how everything in the case, all the testimony, is circumstantial evidence. A jury is entitled to take all of that into consideration. You are even entitled to take all these things as circumstantial evidence betraying the truth or falsity of testimony.

I am giving you these illustrations—I am not picking them out, but two of them occurred to me while the attorneys were summing up. You see, judges have to decide cases without juries, so we are more used to doing it than the average layman. But I want the jury to understand its privileges and also its obligations to both sides. [fol. 280] These informations charge violations of a law that makes it unlawful to sell or offer a commodity in violation of any regulation of the Office of Price Administration. You have testimony in the case that there was the price of the turkeys that were sold to these purchasers, of the chickens at 37½ cents a pound, and that the price of the turkeys was somewhere between 40 and 45 cents a pound. You can remember that as well as I can. They are not allowed to sell over those prices. There is a regulation also, the statute which makes the regulations a law. There is another regulation which says: "Price limitations \* \* \* shall not be evaded whether by direct or indirect methods, in connection with any offer, solicitation, agreement, sale, delivery \* \* \*, alone or in conjunction with any other commodity, or by way of \* \* \* other charge, \* \* \* or other trade understanding or otherwise."

These defendants are charged with having done precisely what that regulation forbids their doing. In order to find either the corporation or Max Kraus guilty you

have to find that. This business of quibbling about the definitions of the words "compel" and "require"—of course we have to use words, and they are frequently open to criticism. English is that kind of language. But what these defendants are charged with having done is imposing as a necessary condition to the purchase of turkeys the simultaneous purchase of gizzards, chicken feet or chicken skin, that were utterly useless and valueless to the purchasers.

In order to violate the law these defendants must have made more than the fixed price of 37½ cents on the chickens, or the turkey price of 40 to 45 cents. And the testimony about the use of these additional articles sold, the use that can be made of them, will enable you to determine [fol. 281] that they were sold at prices—and the prices are on all these slips that are in evidence—entirely out of line with any value that attaches to them, so that it is almost entirely profit to these defendants, and in doing that, by making the purchase of these things at the prices fixed, the defendants both realized a greater consideration than the Office of Price Administration allows for the commodity sold. Now the thing is just as simple as that, although we have been arguing about it a couple of days, about the definition of it.

This defendant corporation had, according to one witness, fourteen salesmen, and I think somebody said three luggers. Well, whatever the number is, any one of the salesmen who effects a sale there, anybody around there with an apron in dealing with a purchaser, has the assumed authority to represent the corporation whose premises it is, and the corporation is liable and responsible for any sale effected by any one of them. The sales are not disputed, by the way. These sales slips or invoices, as they are called, are all in evidence. The defendants have not objected to them, and they evidence sales of the commodities that were disposed of. The one question in the case is whether the sale of the chicken skin and feet was a necessary condition to the purchase of the other.

We come now to Max Kraus. I have just told you under what circumstances you may find the defendant corporation guilty. Max Kraus is charged with having participated in the sales or engineered the sales on the 24th. That is the date they were selling turkeys. You have testimony

for and against his presence on the floor and at the door and on the street and around the place. You may determine where the witnesses testified he was, and so forth. But it is a good rule in determining an issue of fact, as [fol. 282] it is on a ball field, to keep your eye on the ball. I call your attention to the testimony of Nathan, whatever his last name is. He spent all his life, or twenty-five years anyway, with the defendant. He testified yesterday afternoon that all of these purchasers of turkeys had indicated their desire and intent to purchase, and so he made out a list. Whether he prepared the rationing of the turkeys among the prospective buyers of the corporation, I don't remember. You will have to determine that. It doesn't make much difference because if he did, he said Mr. Kraus agreed with him, and if he didn't somebody did and he did not say that anybody else did, but that the two of them had to do with the preparation of that list. Don't worry about the definition of sale. A sale is merely a transfer of title for a consideration, and under the federal law in this case even if the information says it was the corporation that sold it, anybody who aids, abets, counsels, advises or commands the commission of a crime is a principal, so that I don't want you to bother about any legal definitions here at all. Mr. Kraus is charged with having counseled and commanded and abetted the perpetration of an over-the-ceiling sale by the corporation, and if you find that he did any of those things, then he is a principal and you may find him guilty. There is both direct and indirect testimony and circumstantial evidence on this. To find Mr. Kraus guilty you must find that he knew that this sale of chicken odds and ends, if you will allow me to use that to describe what was sold, as a necessary condition to the sale of turkeys, that he must have known it, and either aided, abetted or counseled it or directed it.

There is direct and circumstantial evidence both—I do not know that any of the witnesses said that they had or [fol. 283] dered the feet or the skins. I think one of them said that—one of the luggers or one of the salesmen told him that his father had ordered it, but none of them had any disposition for it and none of them succeeded in disposing of it with the exception of a few pounds.

Then you have the testimony, the direct testimony of Mr. Kraus himself that he hires and fires, so far as he was asked about that; that he keeps his finger on every-



thing that goes on in the business, and from the authority of the president of any corporation, who is present every day, you jurors are expected to know just what his duties are in the default of any evidence as to what they were not.

There is one thing about circumstantial evidence I should have told you about earlier. If you find you can prove a fact by circumstantial evidence and the circumstantial evidence is susceptible to an interpretation favorable to the defendant, then under the reasonable doubt rule you must give the defendant the benefit of that interpretation. If you find circumstantial evidence warrants two sane, intelligent conclusions, one favorable to the defendant and one favorable to the Government, you must adopt the one favorable to the defendant.

The form of your verdict will be either guilty or not guilty of one or more of the counts which you find registered in the informations.

Are there any exception or requests?

#### • REQUESTS AND EXCEPTIONS

Mr. Sahn: I except to such portion of your charge where you stated that the defendant Max Kraus is charged with counseling and abetting. There is no such charge in the information.

I except to so much of your charge which instructs the jury that if they find the defendant, the individual defendant [fol. 284] and Max Kraus aided and abetted, that he must be found guilty.

As this is a substantive count, there is no count of aiding and abetting.

The Court: Anything else?

Mr. Sahn: I except to such portion of your charge where you advised the jury on the question of fact that the chicken skins and gizzards and feet were utterly useless to the purchaser.

The Court: Well, I don't know. I think I modified that to the extent that the evidence showed. I have already told you that any statement of fact about it being utterly useless—there was testimony that they had disposed of some pounds of chicken feet.

Mr. Sahn: I except to such portion of your charge where you labeled certain type of excluded evidence as poppycock.



I except generally to the entire charge.

The Court: Any requests?

Mr. McAuley: None at all.

The Court: All right. Give the foreman the informations and the exhibits. I am going to send the jury out to lunch right away. You may consider the case when you get back.

Mr. McAuley: I have just two sets of copies.

The Court: Are there any marks on the back?

Mr. McAuley: No marks.

The Court: Are you satisfied with that, Mr. Sahn?

Mr. Sahn: Will your Honor instruct the jury that the fifth count has been—

The Court: There is one count there—what is that man's name?

Mr. Sahn: Milton Katz.

[fol. 285] The Court: There is one count there, the fifth count in one of these informations, in which he is charged with a sale to Milton Katz. You will remember there was no such person who appeared before you, and there has been no evidence before you. I struck that out yesterday, I should have told you that. So the fifth count of one of these informations concerning Milton Katz is not to be considered by you in reaching your verdict.

You do not want to take these out with you to lunch. Mr. McAuley, you will see that they get them when they come back from lunch.

Mr. McAuley: All right.

(Jury retired at 12:45 P. M.)

(At 4:10 P. M. the jury came into the courtroom.)

The Court: While the jury was out, I want the record to show they sent me a note which contained a question—which I will give to the stenographer—making an inquiry, and I answered it "Yes," signing it with my initials. The question asked was:

"Is it possible to bring in a verdict on the information against M. Kraus & Brother, Inc., and Max Kraus, holding the corporation guilty but Max Kraus individually innocent?"

I answered "Yes."

You have no exception to that?

Mr. Sahn: No, sir.

[fol. 286]

## VERDICT

The Clerk: Members of the jury, listen to your names as they are called. (Roll called.)

Mr. Foreman, have you agreed upon a verdict?

The Foreman: We have.

The Clerk: How say you?

The Foreman: In relation to the information against M. Kraus & Brothers, Inc., count number 1, not guilty. Count number 2, not guilty. Count number 3, guilty. Count number 4, guilty. Count number 5, guilty. Count number 6, guilty.

The Court: That is the one against the corporation only?

The Foreman: The one against the corporation only.

On the information returned against the corporation and Max Kraus individually, count number 1, guilty, Max Kraus, Incorporated; not guilty, Max Kraus individually. Count number 2, guilty, Max Kraus, Incorporated; not guilty, Max Kraus.

Count number 3, guilty, Max Kraus, Incorporated; not guilty, Max Kraus individually.

Count number 4, guilty, Max Kraus, Incorporated; not guilty, Max Kraus individually.

Count number 6, guilty, Max Kraus, Incorporated; not guilty, Max Kraus individually.

The Clerk: Members of the jury, listen to your verdict as it stands recorded. On information C-117-65, Max Kraus & Brothers, Inc. not guilty on counts 1 and 2; guilty on counts 3, 4, 5 and 6.

On information C-117-64, Max Kraus & Brothers, Inc., and Max Kraus individually, guilty as against the corporation, counts 1, 2, 3, 4 and 6; and Max Kraus not guilty on counts 1, 2, 3, 4 and 6.

The Foreman: Correct.

[fol. 287] The Court: I want to thank the jury for their service.

Mr. Sahn: Your Honor, as to the verdict of guilty against the corporation on four counts in information 117-65 and five counts in the information 117-64, I move to set aside the verdict on the ground that it is against the weight of the evidence.

The Court: Denied.

Mr. Sahn: Exception.

The Clerk: Members of the jury, report tomorrow morning at Room 109 at a quarter of ten.

(Jury excused.)

# SENTENCE

The Court: I am ready to impose sentence now. Are you ready?

Mr. McAuley: The Government is ready.

The Court: What do you recommend?

Mr. McAuley: The Government recommends an aggregate fine against the corporation on the nine counts of \$22,500. Our information is that the extent of the volume of trading by the defendant was in the neighborhood of some nineteen thousand dollars or \$19,500 in chicken feet and skins during the period described in the information.

Mr. Sahn: In the first place, your Honor, I was wondering whether you could put off the imposition of sentence until next week.

The Court: I could, but I do not see any reason why I should. I don't want to. Why do you want to put it off?

Mr. Sahn: I would like to make a statement on this matter. As long as the jury has returned the verdict of guilty, I cannot argue that question here and now, but I [fol. 288] should like to prepare a statement. I should think that it also might be important for the guidance of the court, to have a probation officer examine into this situation as to the corporation and its dealings down on Fourteenth Street, so that the court can better understand the situation and better judge itself in assessing a fine.

The Court: I will deny your application for an adjournment. That is nine counts in the informations?

Mr. McAuley: That is correct, 4 and 5.

Mr. Sahn: With reference to the——

The Court: Let me see the two informations.

(Same handed to the Court.)

Mr. Sahn: Will your Honor hear a statement?

The Court: Go ahead.

Mr. Sahn: Mr. McAuley refers to \$19,000 overcharges and on the basis of the \$19,000 he asked or made a recommendation of \$22,500 fine. In the first place, this \$19,000 sale of gizzards, skin and chicken feet was not within the period stated in the informations, to-wit, November 4th

to November 24th, but for the year of 1943, or rather from April 1, 1943, to December 31, 1943. Those were over a nine-months' period.

The Court: What was? I did not get the beginning of that.

Mr. Sahn: Mr. McAuley stated that there was an overcharge or a charge, rather, for chicken feet, skin and gizzards of \$19,000 during the period covered by the informations.

Mr. McAuley: I did not say overcharge. I said the extent of the business.

Mr. Sahn: The extent of the business. Now that is not the situation. The \$19,000 covered a period of business from April 1, 1943, to December 31, 1943, a period of nine months. Furthermore, as I recall when Mr. McAuley [fol. 289] closed to this jury, he instructed the jury that the maximum fine was \$1,000 on each count. The corporation has been found guilty on nine counts, so that according to his own calculations the very maximum fine that he could recommend or that could be imposed is \$9,000.

The Court: I don't know what he told them but if he has told them that, it is a mistake. The limit is \$5,000 on each count.

Mr. Sahn: That is my impression likewise, your Honor, but the fact remains that the jury may very well have been influenced by the fact that the most this corporation could have been fined was \$1,000 on each count. I ask that the fine imposed upon this corporation be a nominal fine and that your Honor take into consideration the fact that this man has conducted a business here over a period of many years and over a period during which the OPA regulations were in effect; that no question was ever raised about any type of over-the-ceiling sales on poultry, and that this question of chicken feet, chicken skin or gizzards, which still was a question mark in his mind right up to the day the information was handed down—

The Court: A question mark in whose mind?

Mr. Sahn: In the minds of all the parties.

The Court: I will fine the defendant corporation \$2,500 on each of the nine counts on which it has been found guilty. How long do you want to pay it?

Mr. Sahn: We expect to take an appeal, your Honor.

The Court: Well, what about it? Do you get a stay on that? I will give you until two weeks from today to get

a stay: If you don't get it by that time you will pay it or else get consent from the United States Attorney. Don't come back to me for time. Go down to the judge in Part I if you want time. What date is two weeks from today? The 8th of June.

[fol. 290] IN DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK

C. 117/64 and 117/65

Violation of U. S. C. Title 50 Appx. Secs. 901 *et seq.* Requiring persons to buy chicken feet, gizzards & skin as a condition for selling poultry in violation of O P A regulations.

UNITED STATES OF AMERICA

vs.

M. KRAUS & BROS., INC.

JUDGMENT AND COMMITMENT

On this 25th day of May, 1944, upon the proceedings heretofore had herein and on motion of the United States Attorney, it is by the Court

Ordered and Adjudged that the defendant be hereby

Fined on Information #C 117/64 the sum of \$2,500 on each of counts 1-2-3-4-6. Total fine on C 117/64 \$12,500. Fine to be paid by June 8, 1944.

Fined on Information #C 117/65 the sum of \$2,500 on each of counts 3-4-5-6. Total fine \$10,000. Fine to be paid by June 8, 1944.

(Total fine on both Informations \$22,500.)

John W. Clancy, United States District Judge.

[fol. 291] IN UNITED STATES DISTRICT COURT, SOUTHERN  
DISTRICT OF NEW YORK

Information No. C117-64

[Title omitted]

Information No. C117-65

[Title omitted]

NOTICE OF APPEAL OF M. KRAUS & BROS. INC., DEFENDANT-  
APPELLANT

Name and Address of Appellant: M. Kraus & Bros., Inc.,  
20—10th Avenue, New York City, New York.

Name and Address of Appellant's Attorney: Milton E.  
Sahn, 225 Broadway, New York City, N. Y.

[fol. 292] Offense:

In both of the informations in the above entitled cases, the defendant, M. Kraus & Bros. Inc., is charged in connection with the sale by it of poultry, the price of which was regulated by Revised Maximum Price Regulation 269, as an integral part of such sale did unlawfully, wilfully and knowingly evade the provisions of said Revised Maximum Price Regulation 269 Section 1429.5 thereof by demanding, compelling and requiring the purchasers to purchase another commodity, chicken feet or chicken skin as a condition of the sale to them of the aforesaid poultry in violation of Title 50 App. Sec. 901, *et seq.* and the Regulations adopted thereunder.

Both of the informations, No. C117-64 and C117-65 were tried simultaneously before Hon. John W. Clancy and a jury on May 23, 24, and 25, 1944.

Date of Judgment:

Judgment No. 45,449, upon both informations dated and filed May 25, 1944.

Description of Judgment or Sentence:

Fined \$2,500.00 on each of counts 1, 2, 3, 4 and 6 of Information No. C117-64; total fine \$12,500.00.

Fined \$2,500.00 on each of counts 3, 4, 5 and 6 of Information No. C117-65; total fine \$10,000.00.



Name of Prison Where Confined, if Not on Bail:

Stay of Execution of Judgment granted by trial judge until June 8, 1944.

The above named appellant, M. Kraus & Bros. Inc., hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the Judgment above mentioned, upon the grounds set forth below, which are to be amplified and more specifically designated in the assignment of errors to be filed herein.

Dated, New York, New York, May 29, 1944.

M. Kraus & Bros., Inc., by Sigmund Kraus, Secretary-Treasurer. Milton E. Sahn, Attorney for Defendant-Appellant.

#### GROUND S OF APPEAL

Statement of grounds of appeal, which are to be further amplified and specified in the assignment of errors to be filed herein, is as follows:

1. That the trial court erred in denying defendant's motion to dismiss the informations at the close of the government's case and at the close of the entire case as a matter of law and for failure of the government to prove the allegations of said informations and in submitting counts 1, 2, 3, 4 and 6 of information No. C117-64 and counts 3, 4, 5 and 6 of information No. C117-65 to the jury.

2. The trial court erred in denying defendant's motion to dismiss the informations upon the ground that the informations failed to set forth any penalty under the law, to wit, that the informations failed to allege any crime under [fol. 294] section 1429.5 of Maximum Price Regulation 269.

3. That the trial court erred in denying the defendant's motion to set aside the verdict as being against the weight of evidence.

4. That the trial court erred in its charge to the jury with respect to its definition of circumstantial evidence and its application to the evidence in the case.

5. That the trial court further erred in its charge to the jury in connection with its reference to certain evidence sought to be elicited by the defendant which was excluded by the court.



6. That the trial court erred in various other respects in the charge to the jury.

7. That the trial court erred by its constant prejudicial and partial examination of all witnesses and in the admission and exclusion of evidence in such a manner as indicating its opinion on the merits and impressing the jury of its doubt or belief as to the credibility of the witnesses and the guilt of the defendant and in showing open bias and prejudice against the defendant.

8. That the trial court erred in various rulings on the admission and exclusion of evidence as indicated by the exceptions taken during the trial.

9. That the trial court erred by its exclusion of certain types of evidence offered by the defendant and the subsequent inclusion of similar evidence offered by the Government.

[fol. 295] 10. That the trial court erred in failing to correct a statement made by the District Attorney to the jury to the effect that the maximum penalty against the defendant if convicted would be \$1,000.00 on each count when in actuality the maximum penalty would be \$5,000.00 on each count and having permitted that statement to be made without being corrected by it, subsequently imposing a fine of \$2,500.00 on each count against the defendant.

[fol. 296] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Information No. C117-64

[Title omitted]

Information No. C117-65

[Title omitted]

#### ORDER EXTENDING TIME TO FILE RECORD

Upon the Judgment of Conviction entered herein on May 25, 1944; the Notice of Appeal filed herein on May 29, 1944, and served upon the United States Attorney for the Southern District of New York on May 29, 1944; the annexed

Stipulation entered into between James B. M. McNally, [fol. 297] U. S. Attorney for the Southern District of New York and Milton E. Sahn, attorney for the defendant-appellant, M. Kraus & Bros., Inc., and upon all proceedings heretofore had herein, and it appearing to the Court that in the interest of justice additional time will be required by the appellant to procure to be settled and to file with Clerk of this Court its bill of exceptions and assignment of errors, it is hereby

Ordered that the time of the defendant-appellant M. Kraus & Bros., Inc., to procure to be settled and to file with the Clerk of this Court its bill of exceptions and assignment of errors and record on appeal, be and the same is hereby extended to and including the 6th day of September, 1944, and the term of this Court is hereby extended for the same period.

June 12, 1944.

John W. Clancy, United States District Judge.

[fol. 298] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Titles omitted]

#### STIPULATION

It is hereby stipulated and agreed, by and between James B. M. McNally, United States Attorney for the Southern District of New York, and Milton E. Sahn, the attorney for the defendant-appellant, M. Kraus & Bros., Inc., that the time of the defendant-appellant to procure to be settled and to file with the Clerk of this Court its bill of exceptions, assignment of errors and record on appeal be extended to and including the 6th day of September, 1944.

Dated, New York, N. Y., June 7, 1944.

James B. M. McNally, United States Attorney for the Southern District of New York, by Harold J. McAuley, Assistant United States Att'y; Milton E. Sahn, Attorney for Defendant-Appellant.

[fol. 300] IN UNITED STATES DISTRICT COURT, SOUTHERN  
DISTRICT OF NEW YORK

Information No. C117-64

[Title omitted]

Information No. C117-65

[Title omitted]

Now comes M. Kraus & Bros., Inc., defendant-appellant, above named, for its assignment of errors, and avers that in the record, proceedings and final judgments entered in the above entitled cases, errors have intervened to the [fol. 301] prejudice of said defendant-appellant, and presents the following assignment of errors:

I

*The Court erred in denying the motions to dismiss the informations and each and every count thereof, except the 5th count of information No. C117-65, made on behalf of the defendant, M. Kraus & Bros., Inc., at the close of the Government's case upon the grounds:*

A. That the government failed to prove a *prima facie* case and to prove the defendant, M. Kraus & Bros., Inc., guilty beyond a reasonable doubt:

B. That the government utterly failed to prove that the defendant unlawfully, wilfully and knowingly evaded the provisions of Revised Maximum Price Regulation No. 269, Section 1429.5 by demanding, compelling and requiring the individuals named in each and every count of said informations to purchase a commodity such as gizzards, chicken skin or chicken feet as a condition of the sale to said individuals and each of them of certain poultry.

C. That Revised Maximum Price Regulation No. 269, Section 1429.5 does not prohibit the sale of gizzards, chicken skin or chicken feet simultaneously with the purchase of a whole chicken.

D. That the allegations of each and every count of both informations, do not constitute a crime under Revised

Maximum Price Regulation No. 269, Section 1429.5 or any other regulation, law or statute of the United States.

[fol. 302] E. That Section 1429.5 of Revised Maximum Price Regulation No. 269 fails to make any particular act or acts criminal in that it forbids the doing of indefinable acts in terms so vague and uncertain that men of common intelligence must necessarily guess at its meaning and differ as to its application.

Exception was duly taken to the denial of said motions (S. M. 211, 213, 214, 215, 216).

## II

*The Court erred in denying the motion to dismiss the informations made by the defendant, M. Kraus & Bros., Inc., at the close of the whole case and in submitting counts 1, 2, 3, 4 and 6 of Information No. C117-64 and Counts 3, 4, 5 and 6 of Information No. C117-65 to the jury, which motion was made as follows:*

S. M. pages 312-314.

"The Court: I suppose you renew all your motions, and I will make the same rulings.

Mr. Sahn: Sir?

The Court: I suppose you renew all your motions and I will make the same rulings.

Mr. Sahn: Except I should like

The Court: Do you want the jury excused?

Mr. Sahn: Yes, I would like to have the jury excused.

(Whereupon the jury was excused at 11:00 a. m.)

Mr. Sahn: Aside from grounds for dismissal raised at the close of the government's case I move to dismiss the informations generally on the further ground that [fol. 303] there is no statement in any count of the informations that the combined prices of the two articles purchased exceeded the maximum base price set up by Regulation 269. The federal courts have held that any omission from an indictment of any fact or circumstance necessary to constitute an offense cannot be supplied by intendment or implication, and a charge must be made directly and not inferentially or by way of recital. We don't know from the information what

the combined prices of the two articles are. If the combined prices of the two articles do not exceed the maximum price set up by the regulation, there cannot be a crime and the fact that they may have been exceeded cannot be inferred even by testimony, even after a trial.

The Court: I will deny the motion.

Mr. Sahn: I move further to dismiss Count 1 of the information against the individual and the corporation on the ground that the individual mentioned in the information was not the individual to whom the merchandise was sold, in accordance with the testimony and the exhibits, and that therefore these defendants are placed in the position of double jeopardy for at some future time the real purchaser of the merchandise, the man to whom the merchandise was billed, may make a similar complaint against the same defendant.

The Court: Denied.

Mr. Sahn: Exception.

The Court: That is Mandel you are speaking of?

Mr. Sahn: That is both Moskowitz—count 1 in the first information and count 2 in the second information—it [fol 304] applies to both—Moskowitz and Mandel.

The Court: All right.

Mr. Sahn: Exception."

### III

*The Court erred in denying the motion of the defendant, M. Kraus & Bros. Inc., to set aside the verdict on the ground that it was contrary to the evidence, which motion was made and exception taken in the following manner:*

(S. M. 345)

"Mr. Sahn: Your Honor, as to the verdict of guilty against the corporation on four counts in information 117-65 and five counts in the information 117-64, I move to set aside the verdict on the ground that it is against the weight of the evidence.

The Court: Denied.

Mr. Sahn: Exception."

### IV

*The Court committed prejudicial error in its charge to the jury with respect to its characterization of certain evi-*

*dence as claptrap and poppycock, its statement that gizzards, chicken feet and chicken skin were utterly useless to the purchaser and its definition and application to the testimony of circumstantial and character evidence, as follows:*

### Claptrap and Poppycock

(A) At S. M. 327:

"There was a complaint made that I excluded evidence or something that could have been proved. The [fol. 305] law of evidence excludes all claptrap and poppycock. Anything else is admissible. The best illustrations I can give is right before you as a jury, where I first excluded one butcher from talking about his sales of chicken feet, and because subsequent testimony made an issue of what he was going to testify to, if you will remember, I allowed him to be recalled to testify. I have excluded no evidence but I have excluded all claptrap; that is why I am here, to exclude that."

### Character Evidence

(B) At S. M. 332-333:

"Character witnesses have appeared here. This is the law with regard to character witnesses—what they really give you, of course, is reputation. You must, first of all, believe what they are testifying. Then you must consider, if you believe it, with all the other evidence in the case, and if considered with all the other evidence in the case you find it is so strong that it contradicts the positive or the circumstantial evidence in the case, then you may have a reasonable doubt, if you do, of course you have to give the benefit of any reasonable doubt in the case to the defendants."

### Circumstantial Evidence

(C) S. M. 333-334:

"Evidence is direct and circumstantial. There is direct evidence in this case. Mandel's, for instance, is all direct evidence. The other witnesses testified to [fol. 306] buying skin and feet, that they had no use for it except some of them has use of an occasional

pound—that is all direct evidence. Then everything that is evidence in the case, that is, testimony in the case, is circumstantial evidence. Circumstantial evidence is such evidence as to prove the existence of one fact in question by proving the existence of one or more facts from which the existence of the first fact may be derived as a logical conclusion. Jurors are sometimes afraid of it, or so they say they are, but is nothing to be afraid of. It is just as good and sometimes even better than direct evidence, because it is unconscious. You take the testimony of Zweben. He said 'Yes, I was willing to take the chicken feet' or the skin, whichever he bought. 'This defendant was doing me a favor when he sold me turkeys. I think that I ought to pay for it. I see nothing wrong about it.'

~~Now~~ that of course is no direct evidence of anything. The man is testifying to his state of mind, but you may accept that as circumstantial evidence of what had transpired in effecting his sale. Ordinarily a jury is detecting a state of mind from facts, but there you may use that circumstantial evidence to determine a fact from the resulting state of mind."

Quibbling as to "Compel and Require" and Uselessness of Gizzards, Chicken Feet and Skin

(D) S. M. 336:

"These defendants are charged with having done precisely what that regulation forbids their doing. [fol. 307] In order to find either the corporation or Max Kraus guilty you have to find that his business of quibbling about the definitions of the words 'Compel' and 'require'—of course we have to use words, and they are frequently open to criticism. English is that kind of language. But what these defendants are charged with having done is imposing as a necessary condition to the purchase of turkeys the simultaneous purchase of gizzards, chicken feet or chicken skin, that were utterly useless and valueless to the purchasers."

(E) S. M. 339:

"There is direct and circumstantial evidence both—I do not know that any of the witnesses said that



they had ordered the feet or the skins. I think one of them said that—one of the luggers or one of the salesmen told him that his father had ordered it, but none of them had any disposition for it and none of them succeeded in disposing of it with the exception of a few pounds."

Exception was taken as follows (S. M. 341):

"Mr. Sahn: I except to such portion of your charge where you advised the jury on the question of fact that the chicken skins and gizzards and feet were utterly useless to the purchaser.

The Court: Well, I don't know. I think I modified that to the extent that the evidence showed. I have already told you that any statement of fact about it being utterly useless—there was testimony that they had disposed of some pounds of chicken feet.

[fol. 308] Mr. Sahn: I except to such portion of your charge where you labeled certain type of excluded evidence as poppycock.

I except generally to the entire charge."

*The Court committed prejudicial error in permitting the government to introduce evidence over objection of defense counsel, to prove that there was no demand for chicken skin and chicken feet and subsequently denying the defendant the right to prove that there was such a demand, which prejudicial error was committed in the following manner:*

By the Government

At S. M. 9 Direct Examination of Mandel:

"Q. Let us take the summer of 1943, the months of July, August, September and October, around that time. Was any portion of your trade asking you to furnish them with chicken feet? A. None whatsoever.

Q. In your entire business as a butcher had there even been a run on chicken feet? A. Not to my knowledge.

Mr. Sahn: That is objected to.

The Court: I will sustain an objection to the form of the question.

What do you mean by a run on it?

Mr. McAuley: A demand.

The Court: Well, ask him that.

Q. Had there ever been a demand on the part of your trade for chicken feet? A. None whatsoever."

[fol. 309] At S. M. 68 Direct Examination of Kuenslen:

"Q. Have you ever had any type of demand, small, medium or large, for an item known as chicken feet?

A. None.

Q. Never did? A. None.

Q. In the last twenty years how many people, if any, have ever come into your store and asked you for any part of a pound of chicken skin? A. None."

At S. M. 193:

"Q. What did you do with the chicken skin? A. Well, I did not know what to do with it at first. I put it in the icebox.

Q. Why was that you did not know what to do with it at first? A. Well, I never had chicken skins before.

Mr. Sahn: Just a moment, Mr. Witness. That is objected to as not being material and not competent.

The Court: I will allow it.

Mr. Sahn: As to what he did with it.

The Court: I will allow it.

Mr. Sahn: Exception.

Q. Why did you say you did not know what to do with it at first, Mr. Zweben? A. Well, I never sold chicken skin before, but I knew being there is a big demand for all kinds of meats and everything else. I figured maybe I will be able to sell it but I will wait and see what is going to happen after the holidays. I put it in the icebox."

[fol. 310] Exclusion of Defense

And at S. M. 218-222:

"Q. Can you tell us whether the defendant M. Kraus & Brothers, Inc. through any of their salesmen ever offered to sell you chicken skins? A. Yes.

Q. Did you buy it? A. I did not.

Q. Were you able to get poultry without the chicken skins? A. I was, sir.

The Court: What does this prove?

Mr. McAuley: Where and when was this?

Mr. Sahn: I will come to that.

Q. When was that?

The Court: I am not interested in when it was. I want to know why it is, why are you putting this testimony in? What is it supposed to prove?

Mr. Sahn: I intend putting in testimony here to show that there is and has been a demand for chicken skins, chicken feet, gizzards, that they are customarily sold; that they are bought, that they are dealt and traded in. The government has inferred through all of its testimony that chicken skin and chicken feet are so much waste, that they are dumped; that they are not used and they have opened up the door to this type of testimony.

The Court: Well, I will sustain an objection to all of this if it is stated in the record.

Mr. McAuley: I will object to it.

Q. Do you sell chicken feet in your stores? A. I do. [fol. 311] Q. Do you openly display chicken feet in your stores? A. I do.

Mr. McAuley: I will object to that question again.

The Court: Sustained.

Mr. Sahn: Again I call to your Honor's attention to the fact that similar testimony from the opposite viewpoint, that chicken feet are not in demand, was offered and allowed in evidence.

The Court: I do not think the government ever put in issue whether or not there was a demand for chicken feet. There has been a demand for chicken feet for some purpose or other. The only thing we are concerned with is whether or not the witnesses who testified purchased chicken feet to meet a demand in their stores.

Mr. Sahn: I do not think that is the question in the information however, Judge.

The Court: Well, maybe you don't think so but that is going to be the question in this case. Now I have sustained an objection to this kind of testi-

mony. You have an exception in the record, and there is no use wasting any time about it.

Mr. Sahn: I take my exception.

Q. Were you ever compelled to buy chicken skins of the defendant? A. No, sir.

Mr. McAuley: I object to that question.

The Court: Sustained.

Mr. McAuley: Not charged in the information.

Q. Were you ever compelled to buy chicken feet?

[fol. 312] Mr. McAuley: I object to that question.

The Court: Sustained.

Mr. Sahn: That is all.

Mr. McAuley: That is all.

(Witness excused.)

Mr. Sahn: If your Honor please, I should like a ruling at this time, before I take the time of this court in putting on any number of witnesses who would testify to a similar condition in their neighborhood, as to their demand in those particular neighborhoods for such items as chicken feet, chicken skin, gizzards and the like. I should like to know whether your Honor's ruling is going to be the same in all those cases, in all those instances, and whether it is necessary for me to put all these men on the stand and question them all individually and have the same objections.

The Court: It is not only unnecessary but I direct you not to do it. The meaning of my ruling is perfectly clear. It is entirely unnecessary to repeat it.

Mr. Sahn: Mr. Reiner.

BENJAMIN W. REINER, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Sahn:

Q. What business are you in, Mr. Reiner? A. Retail butcher business.

Q. How long have you ben engaged in that business?

A. Approximately four years.

Q. Now where is your store located? A. 1103 Lexington Avenue, New York.

[fol. 313] Q. Have you dealt with the defendant M. Kraus & Brothers, Inc.? A. Yes.

Q. How long have you dealt with that firm? A. Approximately a year.

Q. During the past year have you purchased any chicken feet from them?

Mr. McAuley: I object to that question.

The Court: Objection sustained.

Did you understand what I said?

Mr. Sahn: You said 'sustained'. I understood that your rulings were going to be the same in all of these witnesses that I put on the stand, yes.

The Court: Well, didn't you hear me tell you that I direct you not to put them on the stand; that I have given you an exception to the ruling to any such testimony?

Mr. Sahn: I did not hear that portion of your statement, I am sorry. Now that I understand you perfectly on that, I will not put any other witnesses on the stand to testify to that effect."

#### VI

*The Court erred to the prejudice of the defendant, M. Kraus & Bros. Inc., in admitting over its objection and exception illegal, incompetent, improper and irrelevant testimony, to wit:*

On direct examination of Mandel, government witness,  
S. M. 29.

"Q. Were these two transactions the only two transactions of that type which you had at that time? A. I have had other transactions with M. Kraus & Brothers [fol. 314] at the Fourteenth Street market.

Q. At or about what time? A. Around about that time.

Q. Do I understand it was your habit to go there twice a week? A. About twice a week.

Q. For the purchase of poultry? A. That is right.

Q. So that these two transactions would represent only what you did in one week, is that correct? A. That is right.

Mr. Sahn: That is objected to, your Honor.

The Court: Overruled.

Mr. Sahn: Not being within the issues.

The Court: Overruled."

Q. On redirect examination of Mandel, government witness, S. M. 58:

"Q. You have never been a wholesaler of poultry or meats? A. Never a wholesaler.

Q. You are a retailer? A. I am a retailer.

Q. Now will you look again at Government's Exhibits 1, 2 and 3 in evidence and tell me if there is anything about these two transactions which you have neglected to tell the Court and jury (handing)? A. Well, that, we will say is this bill of November 10th, when the poultry was purchased and brought up to my place of business, I found it was short about—my uncle who is in charge of my place up there, the manager, so-called, weighed the barrels out and we found quite a shortage on the barrels, in some particular barrels as high as four and five pounds short.

[fol. 315] Mr. Sahn: May I ask that the testimony be stricken out as incompetent, not part of the pleadings, and no allegations in the information about shortages of fowl.

The Court: Overruled.

Mr. Sahn: Exception."

## VII

*The Court committed prejudicial error in refusing to permit counsel for the defense to examine an affidavit of Braverman, government witness, in permitting the government to impeach and to refresh the recollection of this witness by means thereof and to orally introduce into evidence the contents of said affidavit on direct examination. Similar error was committed with respect to Moskowitz, government witness, thereby preventing the defendant from properly cross-examining these witnesses.*

On direct examination of Braverman (S. M. 117, 118):

"Q. Now I have some printing here. Would you look at this piece of paper (handing). A. This I can read.

Q. You can read this? A. Yes.

Q. Will you read from there it says 'Q'—q-u-e-s-t-i-o-n here—all the way down to the bottom, and tell me if that refreshes your recollection (indicating)—as to what happened on the day you bought these chickens. A. (After reading) I read it all.

Q. Can you read the words there? A. Yes.

Mr. Sahn: I ask now that that testimony be shown to me before the witness testifies to it. Under the [fol. 316] decision of the Supreme Court in *United States v. Socony Vacuum Oil Company*, where it was held that where grand jury minutes are used to refresh a witness's recollection—

Mr. McAuley: These are not grand jury minutes.

Mr. Sahn:—it is discretionary with the Judge whether or not such minutes might be used to refresh his recollection, and I am not questioning your Honor's discretion here in allowing this witness's recollection to be refreshed, but the court also held that under such circumstances opposing counsel is entitled to see a copy of the minutes.

The Court: I haven't been exercising any discretion. I would hold that the United States had an absolute legal right to insist on doing precisely what it has done. I will deny your application, which I understand is for permission to read what the witness has read.

Mr. Sahn: My application is to read then the original affidavit allegedly signed by that witness on which those questions and answers are based.

The Court: I do not even know that there was an affidavit signed by him. I deny your application no matter how you phrase it, if it is to read the matter that has just been presented to the witness.

Mr. Sahn: Exception.

Q. Mr. Braverman, have you read each and every one of the words there? A. Yes.

Q. Now does reading those words refresh your mind about what actually happened on the day you bought the chickens? A. Yes.

[fol. 317] Q. It does clear up your mind? A. Yes, sure."



And at S. M. 120-122:

“Q. Now, Mr. Braverman, on the 19th day of April, 1944, did I ask you if there was a ceiling price on chickens? A. Yes.

Q. Did you answer: ‘Yeh, sure.’ A. Yes.

Q. Just listen carefully. Did I ask you: ‘Q. Were you willing to buy at the ceiling price?’ A. Yes.

Q. Did I ask you that—

Mr. Sahn: If your Honor please, I object to that method of getting those questions and answers into the record.

The Court: Overruled.

Mr. Sahn: Exception.

Q. Did I ask you:

‘Were you willing to buy at the ceiling price?’ A. Yes.

Q. And did you answer: ‘Yeh, sure.’ Is that correct? A. Yes.

Q. And did I ask you: ‘What conversation did you have with Kraus?’ Did I ask you that? A. I don’t remember that.

Q. Well, do you recall if I asked you, “What conversations did you have with Kraus?” A. With Kraus people, not with Kraus alone, because I never talked to the man.

Q. Now does the word Kraus—does that mean Kraus people to you? A. It means they have a lot of people working there, they have about fifteen or twenty men, [fol. 318] maybe thirty men working there. It is like Swift & Company—I never talked to Swift.

Q. Did you answer: ‘No conversation at all; just went over and he give me poultry because you can’t get all you want; he gives you so much and so much.’ Did you answer that? A. Yes.

Q. Were you asked the question: ‘He gives you a certain amount of poultry?’ and did you answer: ‘Yeh.’ A. Yes.

Q. And were you asked the question: ‘What happened then?’ and did you answer— A. Yes, sure.

Q. —‘Nothing; I took the poultry and I went home.’ A. That is right.

Q. Is that correct? A. Yes.

Q. Were you asked the question: 'Did you ask for chicken feet?'—did I ask you that? A. If I asked for chicken feet?

Q. 'Q. Did you ask for chicken feet?' A. The day that I got the poultry—

Q. No; did I ask you that question in my office? A. Yes.

Q. And did you answer: 'No.' A. I said—I answered no?

Q. Did you answer 'no' when I asked you the question: 'Did you ask for chicken feet?' And did you answer 'No.' A. I didn't ask him for chicken feet because—

Q. Did I ask you— A. Yes.

Q. If you asked Kraus for chicken feet—did I ask you that question? A. I don't remember.

Q. Do you recall if you answered 'no'? A. I don't remember that.

Q. Did I ask you 'Would you have preferred not to buy them?'—did I ask you that? A. I don't remember.

[fol. 319] Q. And did you answer: 'no, no.' A. If I went in and asked for chicken feet?

Q. No; whether I asked you. A. I don't remember that.

Q. Did I ask you that question in my office? A. I don't remember.

Q. Did I ask you if 'You wanted them?' and did you answer 'Yeh'. A. I don't remember that.

The Court: I think that is enough.

Mr. McAuley: All right, your Honor."

On direct examination of Moskowitz (S. M. 151, 152):

"Mr. McAuley: Now your Honor, I would like, since I think this is important, to read, if I may, to attempt to refresh this witness's recollection by—

The Court: Do you know what refreshing your recollection means?

The Witness: Yes, trying to remember.

The Court: After you saw those papers—

The Witness: Well you see—

The Court: You had better allow me to finish the question. After reading those two papers do you re-

member what happened more clearly last November 22nd and 23rd?

The Witness: Your Honor, I do not remember who the people are who marked those tickets up.

The Court: I am not asking you that. I suppose there is no use of asking you any further.

Mr. Sahn: I object to the reading of any question or answer from any statement into the record on the ground that the reading of such statement constitutes [fol. 320] an offering of the statement itself into the record indirectly.

The Court: Overruled."

### VIII

*That the Court erred in failing to correct a statement made by the Assistant United States Attorney to the jury to the effect that the maximum penalty against the defendant if convicted would be \$1,000.00 on each count when in actuality the maximum penalty would be \$5,000.00 on each count and having permitted that statement to be made without being corrected by it subsequently imposing a fine of \$2,500.00 on each count against the defendant.*

Wherefore, the defendant-appellant, M. Kraus & Bros. Inc., prays:

1. That the judgments herein be revised;
2. That the sentences imposed upon it, be set aside;
3. The informations dismissed; and
4. That it may have such other and further relief in the premises as the court may deem just and proper.

Milton E. Sahn, Attorney for Appellant, M. Kraus & Bros. Inc., Office & P. O. Address, #225 Broadway, New York, N. Y.

[fol. 321] IN UNITED STATES DISTRICT COURT, SOUTHERN  
DISTRICT OF NEW YORK

[Titles omitted]

STIPULATION AS TO EXHIBITS

It is hereby stipulated and agreed by the undersigned, that all exhibits received in evidence at the trial of this cause, shall be deemed a part of the Bill of Exceptions herein, and be omitted from the record; and it is further stipulated and agreed that, upon the argument of the Appeal, either party may make use of any of the exhibits.

It is further stipulated and agreed that the foregoing is a true copy of the transcript of the record in the above [fol. 322] entitled cases; that it, together with the exhibits as above stipulated, contains all the evidence in the cause and that the same has been prepared within the time allowed by law and the Court, and may be settled and ordered on file as to the Bill of Exceptions as to the defendant herein.

Dated: New York, New York, August 21, 1944.

James B. McNally, United States Attorney for the  
Southern District of New York, Assistant U. S.  
Attorney, by A. J. McAuley. Milton E. Sahn,  
Attorney for Defendant-Appellant.

[fol. 323] IN UNITED STATES DISTRICT COURT, SOUTHERN  
DISTRICT OF NEW YORK

[Titles omitted]

ORDER DIRECTING FILING OF RECORD

Upon the annexed Stipulation of the attorneys for the respective parties in the above entitled matter, dated the — day of August, 1944, it is

Ordered that the foregoing may be settled and ordered on file as the bill of exceptions herein.

Dated, New York, N. Y., August 22, 1944.

Shackelford Miller, Jr., United States District Judge.

[fol. 324] IN UNITED STATES DISTRICT COURT, SOUTHERN  
DISTRICT OF NEW YORK

Information No. C117-64

[Title omitted]

Information No. C117-65

[Title omitted]

STIPULATION AS TO RECORD

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated, New York, New York, Aug. 31, 1944.

James B. McNally, United States Attorney for the  
Southern District of New York, Assistant U. S.  
Attorney, by H. J. McAuley, Milton E. Sahn, At-  
torney for Defendant-Appellant.

[fol. 325] Clerk's Certificate to foregoing transcript  
omitted in printing.

[fol. 326] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE  
SECOND CIRCUIT, OCTOBER TERM, 1944

No. 162

(Argued February 9, 1945. Decided May 14, 1945)

Information No. C117-64

THE UNITED STATES OF AMERICA, Plaintiff-Appellee,

against

M. KRAUS & BROS. INC., Defendant-Appellant;

MAX KRAUS, Defendant

Information No. C117-65

THE UNITED STATES OF AMERICA, Plaintiff-Appellee,

against

M. KRAUS & BROS. INC., Defendant-Appellant

[fol. 327] Before Evans and Chase, Circuit Judges, and  
Hincks, District Judge

On Appeal from the United States District Court for the  
Southern District of New York. Affirmed.

John F. X. McGohey (Harold J. McAnley of counsel) for  
plaintiff-appellee.

Milton E. Sahn (Alfred C. McKenzie of counsel) for  
defendant-appellant.

EVANS, Circuit Judge:

Appellant corporation was fined \$2,500 on each of nine  
counts \* for violating Revised Maximum Price Regulation

* Information	Amt. of Poultry Product Sold	To	Additional Product and Price		
No. C117-64					
Count 1	875 lbs.	M	427 lbs. chicken feet	@ 15¢ lb.	
2	104 "	B	5 "	@ 20¢ "	
3	106 "	B	5 "	@ 20¢ "	
4	105 "	B	5 "	@ 20¢ "	
6	378 "	Z	226 "	@ 15¢ "	
No. C117-65					
3	358 "	Z	100 lbs. chicken skin	@ 30¢ "	
4	211 "	C	110 lbs. chicken feet	@ 15¢ "	
5	340 "	Ku.	75 lbs. chicken skin	@ 30¢ "	
6	205 "	Kl.	100 lbs. chicken feet	@ 15¢ "	

The sales which furnished the basis of each charge occurred on either  
November 22nd, 23rd, or 24th, 1943.

No. 269, Sec. 1429.5, announced pursuant to Title 50, U. S. [fol. 328] C. A., Sec. 901, *et seq.* It required purchasers of poultry, so it is charged, to buy unwanted commodities, i. e., chicken feet and chicken skin, in order to obtain regular poultry. The jury found the individual defendant not-guilty and the corporation, guilty.

The fines were assessed at the rate of \$2,500 for each of the nine counts on which the defendant corporation was found guilty. There was some evidence that the \$22,500 fine bore a relation to the total amount of income derived by the corporation from the sale of these extra commodities of chicken feet and skin.

There was evidence which supports the statement that when retail butchers placed their orders for poultry at the Thanksgiving Holiday Season in 1943 with defendant, they were told they would receive their share of poultry and to pick it up. When they came to the wholesale store of the defendant corporation the luggers would place the barrels of poultry on the retailer's truck, and would also place separate barrels or boxes of chicken skin, feet or gizzards. These added items had not been ordered by the retailers, nor were they particularly wanted by them. Separate bills were rendered the retailers, one for the poultry, and the other for the unordered feet, etc. There is some evidence that some of these feet were actually sold at the price the retailer paid for them, but the great part of them were given to the "fat" collector, to charitable institutions, or as gratuities to customers.

We have no doubt that the jury was justified in finding that the device of selling these unwanted items, supplementary to the sale of poultry, was a plain device to circumvent the ceiling price on poultry.

Defendant presents five alleged errors.

[fol. 329] (1) No count of either information defines a crime under Sec. 1429.5 of Reg. No. 269.

(2) The regulation, which is the basis of the charge, is unconstitutional.

(3) Failure of evidence to establish guilt.

(4) The court committed prejudicial error in characterization of certain of defendant's evidence as claptrap and poppycock and in stating that gizzards, chicken feet, and chicken skin were utterly useless to the purchaser.



(5) Errors as to admission of evidence.

We pass without extended discussion points 1, 2, and 3. They are, in our opinion, clearly without merit. The informations were sufficiently detailed to apprise the defendants of the illegal acts with which they were charged, and enabled them to defend themselves against the charges. They so clearly follow the wording of the Regulations that they must stand or fall with the validity of the Regulations.

That the Maximum Price Regulations No. 269, Sec. 1429.5, covering a case (disclosed by the evidence here) where butchers who were eagerly seeking to acquire poultry to fill their Thanksgiving trade, paid ceiling prices for the poultry, and also were required to purchase and pay for unwanted articles of little or no market value and pay for them prices in excess of their value, are valid, has been the uniform holding of the courts. *Bowles v. Willingham*, 321 U. S. 503; *Brown v. Banana Distributors*, 52 F. Supp. 804; *U. S. v. Armour & Co.*, 50 F. Supp. 347; *Rottenburg v. U. S.*, 137 F. 2d 850; *Rosensweig v. United States*, 144 F. (2d) 30.

[fol. 330] *Ruling of Trial Court in Refusing Defense Permission to Examine Prior Affidavits of Witness.* Witnesses Braverman and Moskowitz had executed affidavits for the District Attorney and for O. P. A. investigators, in preparation for the trial. On the witness stand these affidavits were used by government counsel to refresh these hostile witnesses' memories, the witnesses having given answers which were contrary to their statements in the affidavits. Defendants' attorney asked permission of the court to examine these affidavits and was denied such use. Claim is here made that such denial constitutes prejudicial error.

We unhesitatingly say that the more orderly procedure would be to let defense counsel see these affidavits. See *Wigmore on Evidence*, Secs. 734-765. The Supreme Court rather recently discussed this problem at length. *U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 231-237. More need not be written.

The documents there being used were statements made by witnesses before the grand jury. The Court of Appeals held the use of such statements on about 90 occasions was prejudicial error. The Supreme Court held the contrary:

"Use of grand jury testimony for the purpose of refreshing the recollection of a witness rests in the sound

discretion of the trial judge and no iron-clad rule requires that opposing counsel be shown the grand jury transcript where it is not shown the witness and where some appropriate procedure is adopted to prevent its improper use.

"Permission to use grand jury testimony to refresh the memories of witnesses in a criminal case is not ground for a new trial, even if erroneous, where it was clearly not prejudicial and did not affect substantial rights of the defendant."

[fol. 331] The court however guarded its holding by saying,

"Normally, of course, the material so used must be shown to opposing counsel upon demand, if it is handed to the witness. \* \* \* And the reasons are that only in that way can opposing counsel avoid the risks of imposition on and improper communication with the witness, and 'detect circumstances not appearing on the surface' and 'expose all that detracts from the weight of testimony.' \* \* \* If the record showed that the refreshing material was deliberately used for the purposes not material to the issues but to arouse the passions of the jurors, so that an objective appraisal of the evidence was unlikely, there would be reversible error. Likewise, there would be error where under the pretext of refreshing a witness' recollection, the prior testimony was introduced as evidence \* \* \* In addition, it clearly appears that the use of this material was not prejudicial."

"The record minus that testimony clearly establishes all the facts necessary for proof of the illegal conspiracy. \* \* \* Hence, the situation is vastly different from those cases where essential ingredients of the crime were dependent on testimony elicited in that manner or where the evidence of guilt hung in delicate balance if that testimony was deleted. \* \* \* Hence, assuming, arguendo, that there was error in the use of the prior testimony, to order a new trial would be to violate the standards of Sec. 269 of the Judicial Code, since the 'substantial rights' of respondents were not affected. There are no vested individual rights in the ordinary rules of evidence; their observance should not be reduced to an idle ceremony."

[fol. 332]. We can not conceive how defendant suffered by reason of the court's refusal to direct Government counsel to let defendant's counsel see the affidavits.

The ruling was within the court's discretion. Wigmore, Sec. 765. There is nothing in the record to demonstrate any abuse of this judicial discretion. If counsel desired to predicate a claim of error upon the ruling he should have asked to have the affidavits marked for identification and have taken appropriate steps to include them in the record herein. Certainly without knowledge of their entire content, this court cannot say that the defendant by the ruling below was deprived of opportunity for a "cross-examination based upon the paper" whereby "he may further detect circumstances not appearing on the surface, and may expose all that detracts from the weight of the testimony." Wigmore, Sec. 762.

Both Braverman and Moskowitz were hostile government witnesses. They permitted their hostility to go so far as to dispute their sworn statements to the effect that they knew and dealt with the individual defendant, Max Kraus. It was not a case of discrediting defendant's witnesses, but rather an effort, and a legitimate one, on the part of the Government, to secure the truth from a hostile witness. The statement which was used was intended to connect the individual Kraus with the sale of the poultry. A situation was presented, it seems to us, where the Government might well have considered the advisability of charging perjury against these witnesses. Counsel for the government were struggling with witnesses, which they had to use, but who were defendant Kraus' customers. Unfortunately these witnesses were no credit to defendant or anyone else. But the illegal transaction necessitated their use as witnesses. They denied connection with Max Kraus. In so doing they disputed their previously made sworn statements [fol. 333]. So confronted by hostile and unworthy citizens, the government sought to give them every possible chance of telling the truth. Their sworn statements were shown them.

Just what value an examination of said witnesses' written statement by defendant's counsel would have been, we cannot see. Did counsel wish to discredit the witnesses? Obviously not. The witnesses were so hostile to the government and so friendly to the defendant that a reading of their testimony suggests perjury. And the word "suggests" is

mild. If defendant's counsel sought to add greater discredit to the witnesses than their own change in testimony produced, he would not have helped his client. Moreover, the jury ultimately found in favor of the individual defendant, Kraus.

We are clearly convinced that no prejudicial error was committed in point of fact or within the recent holding of the Supreme Court. (*United States v. Krulwich*, 2 Cir. 145 F. 2d 76; *United States v. Cohen*, 2 Cir., 145 F. 2d 82; *United States v. Simonds*, 2 Cir., 147 F. 2d —, decided March 13, 1945.

Finally we come to the alleged error in the court's instructions to the jury. It is argued that the court characterized certain evidence offered by defendant as "claptrap and poppycock." The instruction, as given, reads:

"There was a complaint made that I excluded evidence of something that could have been proved. The law of evidence excludes all claptrap and poppycock. Anything else is admissible. The best illustrations I can give is right before you as a jury, where I first excluded one butcher from talking about his sales of chicken feet, and because subsequent testimony made an issue of what he was going to testify to, if you will [fol. 334] remember, I allowed him to be recalled to testify. I have excluded no evidence but I have excluded all claptrap; that is why I am here, to exclude that. You are not to assume that any injustice has been done anybody because I did not do any injustice."

No exception was taken to this charge. No request was made to define claptrap and poppycock. If we accept the dictionary definition of these words, we must assume that claptrap means "language designed to evoke applause; cheap or unworthy articles." Poppycock is defined as "trivial," "stuff." With this meaning of the words there was at least no inaccuracy in stating that the law of evidence excludes all claptrap and poppycock.

While it might well be argued that "anything" other than claptrap and poppycock "is admissible," as evidence, is hardly correct, there was and is no criticism from counsel as to this sentence. Counsel and the jury evidently understood the charge to mean that only material and relevant

evidence was admissible, and all hearsay and irrelevant evidence was excluded.

The judgment is Affirmed.

HINCKS, D. J., dissenting:

My dissent is based upon the exclusion of evidence. The defendant offered witnesses to prove that there was a general market for the chicken feet, skin and gizzards the sale of which, in conjunction with the defendant's sales of poultry, the government claimed was a device for evading the ceiling price on the poultry. This evidence was excluded and on inquiry by defense counsel when confronted by this ruling as to whether it was necessary for him to offer his [fol. 335] other witnesses on that issue, the judge said: "It is not only unnecessary but I direct you not to do it. The meaning of my ruling is perfectly clear. It is unnecessary to repeat it."

In so ruling, it appears to me that the judge must have overlooked the tendency of such evidence to negative an inference that the sales were made with evasive intent. It was admissible on that fundamental issue, and its exclusion was erroneous.

Nor was the error cured. To be sure, at a later stage after the United States Attorney, on his cross-examination of the individual defendant, had inquired as to the general market for these by-products, defendant's counsel encountered no objection when he again offered one witness on that issue. By that time his other witnesses, for aught that appears, had been excused and were no longer available. In any event, the judge's exclusionary direction was still in effect and the defendant's other witnesses were never heard.

For what to me seems prejudicial error I think the appellant entitled to a new trial.

[fol. 336] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND  
CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 31<sup>st</sup> day of May, one thousand nine hundred and forty-five.

Present: Hon. Evan A. Evans, Hon. Harrie B. Chase,  
Circuit Judges; Hon. Carroll C. Hincks, District Judge

UNITED STATES, Plaintiff-Appellee,

v.

M. KRAUS & BROS., Inc., Defendant-Appellant

Appeal from the District Court of the United States for  
the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 337] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. United States v. M. Kraus & Bros., Inc. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed May 31, 1945. A. M. Bell, Clerk.

[fol. 338] Clerk's Certificate to foregoing transcript omitted in printing.



[fol. 339] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 8, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson and Mr. Justice Burton took no part in the consideration or decision of this application.

Endorsed on cover: File No. 49,901. U. S. Circuit Court of Appeals, Second Circuit. Term No. 198. M. Kraus & Bros. Inc., Petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed July 5, 1945. Term No. 198 O. T. 1945.



FILE COPY

Office - Supreme Court, U. S.  
FILED

JUL 5/1945

CHARLES ELMORE DROPLEY  
CLERK

**Supreme Court of the United States**

**OCTOBER TERM 1945**

No. **198**

M. KRAUS & BROS., INC.,

*Petitioner,*

*against*

UNITED STATES OF AMERICA,

*Respondent.*

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND  
CIRCUIT**

✓ **THOMAS TURNER COOKE,**

60 Broadway,

New York, N. Y.

*Attorney for Petitioner.*

**I. JONAS SPECINER,**  
11 West 42nd Street,  
New York, N. Y.

**FRANK W. FORD,**  
20 Exchange Place,  
New York, N. Y.  
*Of Counsel.*

July 5, 1945.

# INDEX

	PAGE
OPINIONS BELOW .....	2
JURISDICTION .....	2
QUESTIONS PRESENTED .....	2
STATUTE AND REGULATIONS INVOLVED .....	4
STATEMENT .....	5
SPECIFICATION OF ERRORS TO BE URGED .....	9
REASONS FOR GRANTING THE WRIT .....	10
CONCLUSION .....	13

## CITATIONS

### CASES:

<i>Amiable Nancy, The</i> , 3 Wheat. 546 .....	12
<i>Berger v. U. S.</i> , 295 U. S. 781 .....	13
<i>Crawford v. U. S.</i> , 212 U. S. 183 .....	11
<i>Grant Bros. Construction Co. v. U. S.</i> , 114 Pac. 955, 12 Ariz. 388, affd. 232 U. S. 647 .....	12
<i>John Gund Brewing Co. v. U. S.</i> (C. C. A. 8th) 204 Fed. 17 .....	12
<i>Lake Shore &amp; Mich. So. Ry. Co. v. Prentice</i> , 147 U. S. 101 .....	12
<i>U. S. v. Socony-Vacuum Oil Co.</i> , 310 U. S. 150 ..	12, 13
<i>U. S. Food &amp; Grocery Bureau of So. Cal. Inc.</i> , 43 Fed. Supp. 966 .....	12
<i>U. S. v. Corlin</i> , 44 Fed. Supp. 940 .....	12
<i>Viereck v. U. S.</i> , 318 U. S. 236 .....	13
<i>Washington Gaslight Co. v. Lansden</i> , 172 U. S. 534 .....	12

STATUTES AND REGULATIONS:

PAGE

Emergency Price Control Act of 1942, 56 Stat. 37 (U. S. C. Title 50, War, Appendix Sections 901-946) .....	1, 4
Evasion, Regulation as to (Sec. 1429.5) .....	5, 6
Maximum Price Regulation No. 269 (Revised) ..	5

**Supreme Court of the United States**

**OCTOBER TERM 1945**

**M. KRAUS & BROS., INC.,**  
*Petitioner,*

*against*

**UNITED STATES OF AMERICA,**  
*Respondent.*

No. ....

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND  
CIRCUIT**

**TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES  
OF THE SUPREME COURT OF THE UNITED STATES:**

Your petitioner, M. Kraus & Bros., Inc., a New York corporation, respectfully applies for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review a judgment of that Court entered May 31, 1945 (R. 336), affirming a judgment of the United States District Court for the Southern District of New York (R. 290), entered after a jury verdict (R. 286-7) in a criminal prosecution for alleged violations of maximum price regulations issued under the authority of the Emergency Price Control Act of 1942. A certified copy of the record in the case, including the proceedings in said Circuit Court of Appeals, is furnished herewith in accordance with Rule 38, paragraph 1 of the Rules of this Court.

## Opinions Below

The District Court rendered no opinion. The opinions of the Circuit Court of Appeals are not yet reported. The majority opinion is at R. 327-334. The dissenting opinion of Hincks, D. J., is at R. 334-5.

## Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C., Sec. 347(a)) and as modified, pursuant to the Act of March 8, 1934 (19 U. S. C., Sec. 688), by Rule XI of the Rules of Practice and Procedure after verdict in criminal cases (292 U. S. 661, 666).

## Questions Presented

(1) Is the mere selling of poultry, at the maximum price established by the Price Administrator under the Emergency Price Control Act of 1942, in conjunction with edible poultry parts, upon which no such price has been fixed, a criminal offense under the regulation of the Price Administrator which prohibits, without specifying "tying-agreements", the evasion of established maximum prices, irrespective of whether the intrinsic or market value of the edible poultry parts is as great or greater than the price charged therefor, when the purchaser has not requested that he be permitted to buy the poultry separately.

(2) Is the mere conditioning of the sale of poultry, which is sold at the maximum prices established by the Price Administrator under the Emergency Price Control Act of 1942, upon the purchase in conjunction therewith of edible poultry parts, for which no such maximum prices have been established, a criminal offense under the Act and

the regulation of the Price Administrator prohibiting the evasion of established maximum prices, without specifying "tying agreements", irrespective of whether the intrinsic or market value of the edible poultry parts is as great or greater than the price charged therefor.

(3) In a prosecution for conditioning the sale of poultry upon the purchase in conjunction therewith of edible poultry parts, in alleged evasion of such established maximum prices, is the intrinsic or market value of such parts or the demand therefor a material fact which the defendant is entitled to prove by disinterested witnesses, there being no claim that the poultry itself was sold in excess of the maximum prices established by the Price Administrator under the Emergency Price Control Act of 1942?

(4) When poultry, for which such maximum prices have been established, is sold at such maximum prices in conjunction with edible poultry parts, upon which no such prices have been established, does the determination of whether or not the criminal offense of wilfully violating the established maximum prices has been committed by an evasive method depend exclusively upon the usefulness of such poultry parts to the purchaser or does such a determination require the consideration of whether a price is charged therefor which is in excess of the intrinsic value or the fair market price?

(5) May a corporation be properly convicted for wilfully evading established maximum prices for poultry by conditioning the sale thereof upon the purchase of edible poultry parts in conjunction therewith, if the purchasers have dealt exclusively with salesmen and other subordinate employees of the corporation, and no proof is made that any of its officials had knowledge that the sale of the poultry was conditioned upon the purchase of the poultry parts, if such was the fact?

(6) When affidavits of witnesses called by the Government were shown by the prosecution to them for the ostensible purpose of refreshing their recollection, and parts thereof were read to them in this connection, in the presence of the jury, was it reversible error for the trial court to hold that it was not within his discretion to permit the attorney for the defendant to inspect the affidavits?

(7) Was it reversible error for the trial court to permit the prosecution in summing up to the jury to tell it that the maximum fine upon each count was \$1,000, whereas in fact it was \$5,000, and thereafter to impose a fine of \$2,500 upon each of the nine counts upon which verdicts of guilty were found?

### **Statute and Regulations Involved**

The Informations charged violations of Regulations of the Price Administrator under the Emergency Price Control Act of 1942 (Title 50, War, Appendix, U. S. C., Secs. 901-946, Act of January 30, 1942, Ch. 26, Title III, Sec. 306, 56 Stat. 37).

Section 902(a) authorizes the Price Administrator to establish by regulation maximum prices for commodities in furtherance of the purposes of the Act. Section 902(g) authorizes him to make regulations which he deems necessary to prevent the circumvention or evasion of established maximum prices.

Section 902(h) provides that such powers shall not be exercised "to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, except to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this act."



Section 904 makes it unlawful for any person to sell or deliver any commodity in violation of any regulation or order of the Price Administrator under Section 902. Section 925(b) provides that wilful violations of Section 904 shall be subject upon conviction to imprisonment and \$5,000 fine.

Pursuant to this authority, the Price Administrator fixed ceiling prices for poultry (Revised Maximum Price Regulation No. 269, effective December 18, 1942, amended March 16, 1943—Amendment 6) and promulgated a regulation in connection therewith as follows:

“Sec. 1429.5. *Evasion.* Price limitations set forth in this Revised Maximum Price Regulation No. 269 shall not be evaded whether by direct or indirect methods, in connection with any offer, solicitation, agreement, sale, delivery, purchase or receipt of, or relating to, the commodities prices of which are herein regulated, alone or in conjunction with any other commodity, or by way of commission, service, transportation or other charge, or discount, premium, or other privilege or other trade understanding or otherwise.”

### Statement

Petitioner is a wholesale dealer in meat and poultry. (R. 192-3). In 1943 it did a gross business of \$4,000,000 a year. Prior thereto its gross business ran from 7 to 7½ million dollars a year (R. 207). Two Informations (R. 3-13) were consolidated for the purposes of trial. Each count in both Informations charged the making of a sale of poultry in violation of Title 50 App. Sec. 901 et seq. United States Code, commonly known as the Emergency Price Control Act of 1942, and the regulations issued thereunder by the Price Administrator, specifically Sec. 1429.5 of Maximum Price Regulation 269, prohibiting the evasion of established maximum prices.

Max Kraus, the president of petitioner, (R. 207) was named as a co-defendant in the first Information, containing six counts. He was acquitted by the jury on all counts. (R. 286-7).

At the conclusion of the Government's case, Count 5 was dismissed. The petitioner was found guilty on the other five counts of the first Information. It was also found guilty upon Counts 3, 4, 5 and 6 of the second Information, but was acquitted on Counts 1 and 2 thereof (R. 286-7). The Court fined the petitioner \$2,500 on each of the nine counts upon which it was convicted (R. 290).

All of the counts in the two Informations are in the same form. Each charges that the petitioner, in connection with the sale on a specified date of a specified amount of poultry to a specified purchaser, and "as an integral part thereof, unlawfully, wilfully and knowingly evaded the provisions" of revised Maximum Price Regulation No. 269, Sec. 1429.5 "by demanding, compelling and requiring" the purchaser to purchase another commodity (variously specified as being chicken feet, chicken skin, or gizzards) at a specified price "as a condition of the sale to him of the aforesaid poultry."

None of the counts in either of the two Informations contained any allegation that the poultry was sold above the established maximum price, or that the poultry parts were sold above any such price, or that they were sold at a price in excess of their intrinsic or fair market value. All of the sales upon which convictions were obtained occurred in a three day period, November 22-24, 1943.

The Government called as witnesses a number of retail butchers as the purchasers named in the various counts. A number of them had themselves been convicted of maximum price violations (R. 57, 75, 96), and one (Abraham Mandel) had been given a jail sentence which was suspended (R. 57).

None testified that he had asked to buy poultry without purchasing poultry parts. There was no competent testimony believed by the jury that any officials of the petitioner had had anything to do with the alleged conditioning of the sales, the dealings having been exclusively with salesmen or other subordinates (R. 69-71, 81-2, 85, 89, 101, 114, 128-9, 149, 168, 171). Only one (Abraham Mandel, who had received a suspended jail sentence) claimed that the sale of the poultry to him was conditioned upon the sale of poultry parts in conjunction therewith, and even he did not testify that he asked that the poultry be sold to him separately. He likewise specifically denied compulsion to buy (R. 50). The jury acquitted upon both of the counts which were rested upon his transactions (R. 8-9, 286-7).

The Government proved the number of pounds of poultry sold to each purchaser and the price charged therefor. In no case was it claimed that more than the established maximum price was charged. The Government also proved that an employee of the petitioner, at the time of selling the poultry to each of the purchasers, offered each of them a limited amount of chicken-feet, chicken skin or gizzards, and that in all the transactions upon which verdicts of guilty were returned the purchaser accepted the offer, without demur, and paid the price asked therefor.

No proof was offered to the effect that any established maximum price was in existence for any of the poultry parts except gizzards, and in the case of these it was stipulated that they were sold below the ceiling price (R. 49).

Although it was not so alleged in either of the Informations, the Government took the position at the trial that chicken feet, chicken skin and gizzards were substantially worthless (R. 280).

When two of its witnesses (Max Braverman and Harry Moseowitz) did not testify to the satisfaction of the Government, the prosecutor marked for identification (R. 105, 132) affidavits previously made by them and purported to refresh their recollection with them, by showing them to

the witnesses and reading certain parts thereof in the presence of the jury, but when counsel for the defendant demanded the right to inspect the affidavits, the trial court ruled (R. 107):

"I haven't been exercising any discretion. I would hold that the United States had an absolute legal right to insist on doing precisely what it has done. I will deny your application, which I understand is for permission to read what the witness has read."

At the conclusion of the Government's case the defendant moved for directed verdicts on each count, and the motion was denied, except as previously stated, the defendant excepting (R. 183-7).

At the outset of defendant's case counsel put on two witnesses and proposed to call many more to testify to the market for poultry parts, such as gizzards, chicken skin and chicken feet, and the value thereof therein. The trial court sternly and peremptorily directed him not to make such proof (R. 191) on the ground that no such issue was in the case (R. 190), and exception was duly taken (R. 190). As the dissenting judge points out, this ruling, which he considered reversible error (R. 334-5), remained in effect throughout the case (R. 335).

Numerous character witnesses of high standing in the packing and wholesale meat business testified to the excellent reputation of Max Kraus for truth, veracity and abstinence from "black market" violations. One, a vice-president of a bank, testified he knew of no one with a better reputation (R. 259). No attempt was made to impeach any of these witnesses. (R. 250-262).

At the end of the case the defendant again moved for directed verdicts, and motions were denied, with exceptions (R. 263-4).

Summing up to the jury the prosecutor told it that \$1,000 (R. 270) was the maximum fine on each count, whereas in fact it is \$5,000.

Charging the jury the trial court told it that the excluded evidence concerning the market value of poultry parts was "claptrap" and "poppy cock" (R. 274), to which exception was duly taken (R. 284). He also charged that to create a reasonable doubt the character evidence would have to be so strong as to contradict the positive or the circumstantial evidence in the case (R. 278).

### **Specification of Errors to be Urged**

The Circuit Court of Appeals for the Second Circuit erred:

(1) In holding that verdicts ought not to have been directed by the trial court in favor of petitioner.

(2) In holding that the jury was justified in finding beyond a reasonable doubt that petitioner was guilty of the offenses alleged in the counts upon which it was convicted.

(3) In holding that under the evidence petitioner resorted to an illegal device to evade the maximum price ceilings upon poultry.

(4) In holding that the trial court did not commit reversible error in excluding the evidence offered by petitioner to prove the market demand and price of poultry parts.

(5) In holding that it was not reversible error for the trial court to refuse counsel the right to inspect the affidavits of certain Government witnesses which were shown to said witnesses for the purpose of refreshing their recollection and parts of which were read to the witnesses in the presence of the jury.

(6) In holding that the petitioner was properly convicted for the acts of its salesmen and its subordinate employees not brought home to any of its officials.

(7) In holding that it was not reversible error for the trial court to permit the prosecution, in summing up to the jury, to tell it that the maximum fine upon each count was \$1,000, whereas in fact it was \$5,000, and thereafter to impose a fine of \$2,500 upon each of the nine counts upon which verdicts of guilty were found.

### **Reasons for Granting the Writ**

(1) Prior to the enactment of the Emergency Price Control Act of 1942 it is common knowledge that it was customary in many industries to make combination offers, that is, to offer to sell a product in great demand in conjunction with some other slower moving product. This practice is peculiarly appropriate when the product offered for sale in conjunction with the principal product is a by-product thereof; as in the case of poultry and poultry parts. It is likewise peculiarly appropriate during times when the main product is scarce, and complete utilization of its by-products or substitute products is desirable in the public interest, for example, ice cream and sherbet.

No proper claim can be made that chicken gizzards, chicken skin and chicken feet are not edible products, useful in themselves. If no more than the intrinsic or fair market value of the secondary product is asked by the seller, so that no claim can be made that the sale of the secondary product was made at a fictitiously exaggerated price, and particularly if the buyer has not requested that the primary product be sold to him separately, it is difficult to understand how evasion of maximum price regulations can be claimed. The point is raised very sharply in this case because of the trial court's exclusion of all evidence on the part of disinterested witnesses on behalf of the defendant as to the intrinsic or market value or demand for poultry parts (R. 188-192, 48).



It is respectfully submitted that upon such a prosecution the most material element in the case is the true worth or fair market value of the by-product, particularly in view of the caveat in Section 902(b) against compelling changes in business practices. In forbidding the petitioner to prove this fact by disinterested witnesses, it is submitted that the trial court so far departed from the accepted and usual course of judicial proceedings, and the Circuit Court of Appeals for the Second Circuit so far sanctioned such a departure by the trial court, as to call for an exercise of this Court's power of supervision. *Crawford v. U. S.*, 212 U. S. 183, 203.

In addition thereto, the exact conditions under which combination sales are to be regarded as evasive of established maximum prices presents a question of great public importance, which ought to be authoritatively decided by this Court, in view of the fact that current conditions of scarcity have brought into more extended use the combination sale whereby a more plentiful but nevertheless useful article is offered in conjunction with the sale of a scarce article.

(2) Under the current conditions of scarcity in the food market it will inescapably happen that employees, without authority from their employers, will on occasions violate established maximum prices in order to accommodate certain of their regular customers. It is respectfully submitted that their wilful but casual\* violations of law are not properly attributable to their employers without bringing home knowledge thereof to them. An employer instructs employees to sell the goods in stock. There is not enough to

---

\* Less than \$200 worth of poultry parts were involved in the counts upon which the jury convicted. All were sold between November 22, 1943 and November 24, 1943. This is to be compared with average 3 days sales of about \$40,000 in meats and poultry.



go round of certain goods. Of others there is a plentiful supply. How is the employer to necessarily know that on occasions his employees have conditioned the sale of the former on the latter?

It is respectfully submitted that the holding of the Circuit Court of Appeals affirming the refusal of the trial court to direct verdicts for petitioner is contrary to the principles announced in *Lake Shore & Michigan So. Ry. Co. v. Prentice*, 147 U. S. 101, *The Amiable Nancy*, 3 Wheat. 546, and *Washington Gaslight Co. v. Lansden*, 172 U. S. 534; also *John Gund Brewing Co. v. U. S.* (C. C. A. 8th) 204 Fed. 17, at pp. 23-24; *U. S. Food & Grocery Bureau of So. Cal. Inc.*, 43 Fed. Supp. 966 (key nos. 5-9); *U. S. v. Corlin*, 44 Fed. Supp. 940 (key nos. 10 and 12); *Grant Bros. Construction Co. v. U. S.*, 114 Pac. 955, 12 Ariz. 388, affd. 232 U. S. 647. In view of this apparent conflict and the desirability of clarifying the law in respect of the principal's liability for acts of its subordinate agents in wilful violation (as assumed) of regulatory statutes, it is respectfully requested that certiorari be granted upon this question.

(3) In *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, at pages 231-237, this Court discussed the proper methods to be employed in refreshing a witness' recollection by prior sworn statements. In the particular case it held that no reversible error had been committed. In this case, the trial court arbitrarily held that it was not required to exercise any discretion in passing upon the demand of counsel for the petitioner that he be permitted to examine affidavits being shown to witnesses and in part read to the jury.

It is respectfully submitted that in so doing the trial court acted in conflict with this Court's decision in the foregoing case, and that it so far departed from the accepted and usual course of judicial proceedings, and that the Circuit Court of Appeals for the Second Circuit so far sanctioned such departure by the trial court, as to call for an exercise of this Court's power of supervision.

(4) In a number of recent cases, *Berger v. U. S.*, 295 U.S. 781, 784-789, *U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 150, at pp. 237-243, and *Viereck v. U. S.*, 318 U. S. 236, this Court has had occasion to consider allegedly improper action on the part of the prosecution in summing up to the jury. When a jury is told by the prosecutor, as it here was, that the maximum fine which can be imposed is one-fifth of what it actually is, it is respectfully submitted that there is presented a matter of sufficient public importance for this Court to determine whether this constitutes reversible error.

### Conclusion

For the reasons stated, it is respectfully submitted that the petition for writ of certiorari should be granted.

THOMAS TURNER COOKE,  
Attorney for Petitioner.

I. JONAS SPECINER,  
FRANK W. FORD,  
*Of Counsel.*

July 5, 1945

FILE COPY

Office - Supreme Court, U. S.

**Supreme Court of the United States**

**OCTOBER TERM, 1945**

AUG 18 1945  
CHARLES ELMORE DUFFLEY

**No. 198**

**M. KRAUS & BROS., INC.,**

*Petitioner,*

*against*

**UNITED STATES OF AMERICA,**

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES  
CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

**REPLY BRIEF FOR PETITIONER**

✓ **THOMAS TURNER COOKE,**

60 Broadway,

New York, N. Y.

*Attorney for Petitioner.*

1. **JONAS SPECINER,**

11 West 42nd Street,

New York, N. Y.

2. **FRANK W. FORD,**

20 Exchange Place,

New York, N. Y.

*Of Counsel.*

August 13, 1945

**Supreme Court of the United States**

**OCTOBER TERM, 1945**

**M. KRAUS & BROS., INC.,**

*Petitioner,*

*against*

**UNITED STATES OF AMERICA.**

*Respondent.*

No. 198

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

**REPLY BRIEF FOR PETITIONER**

The gist of the Government's main argument is that "it is obvious" that "a dealer who must purchase a secondary product for which he himself has no demand, in order to get a scarce product he desires, is, in fact, paying more than ceiling prices for the scarce commodity, whether or not the secondary commodity can be sold by some other person supplying a different type of trade, and, however fair the price." (Bf., p. 6).

The Government would therefore apply a purely subjective test to the transaction, looked at from the point of view of the particular purchaser,—and apply it exclusively, whereas the test of the statute by virtue of its plain wording (unlawful to "sell or deliver" above an established ceiling price) and well-understood anti-inflationary intent, is plainly objective. The sole question is has the price-fixed article been in fact sold at a price in excess of the ceiling? Acceptance of the Government's argument would mean that

of two combination sales, with the primary and secondary articles respectively sold at the ceiling price and at the same fair price, a transaction with one person might be legal and with another illegal, depending upon the value to the particular purchaser of the secondary commodity.

The Government would, moreover, apply such a purely subjective test, from the point of view of the purchaser, in the face of the plain fact that sales of such useful secondary commodities as poultry parts at fair prices are indisputably anti-inflationary. This for the reason that increased sales of the less-wanted but nevertheless edible parts of poultry plainly increase the amount of food in the market relative to the supply of money and credit, and thus tend to lower the price of the poultry.

The statute is not concerned with the extent to which particular buyers can utilize what they buy or in inhibiting high-pressure salesmanship employed to dispose of less-wanted poultry parts. It seeks to combat inflation by prohibiting sales in excess of ceiling prices, not purchases deemed to be disadvantageous in respect of particular items by particular buyers. The test, we submit, is purely objective. That the trial court's rulings were based on the contrary premise is too plain for argument, as indeed is implicitly admitted by the Government.

### Conclusion

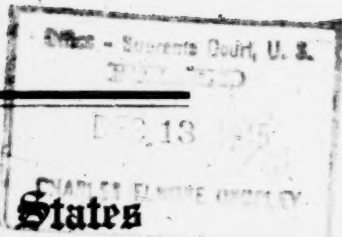
For the reasons stated, it is respectfully submitted that the petition for writ of certiorari be granted.

THOMAS TURNER COOKE,  
*Attorney for Petitioner.*

I. JONAS SPECINER,  
FRANK W. FORD,  
*Of Counsel.*

August 13, 1945.

FILE COPY



IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1945

No. 198

**M. KRAUS & BROS., INC.,**

*Petitioner,*

*—against—*

**UNITED STATES OF AMERICA,**

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF FOR PETITIONER**

✓ **THOMAS TURNER COOKE,**  
*Attorney for Petitioner,*  
60 Broadway,  
New York 4, N. Y.

**I. JONAS SPECINER,**  
11 West 42nd Street,  
New York 17, N. Y.,

**FRANK W. FORD,**  
20 Exchange Place,  
New York 5, N. Y.,  
*Of Counsel.*

# INDEX

	PAGE
OPINION BELOW .....	1
JURISDICTION .....	1
QUESTIONS PRESENTED .....	2
STATUTE AND REGULATION INVOLVED .....	4
STATEMENT .....	6
SPECIFICATION OF ERRORS TO BE URGED .....	20
ARGUMENT .....	21

1—The Sole Issue Presented by the Informations and Tried under the Rulings of the Trial Court was Whether or Not the Sale of Poultry at Ceiling Prices was Conditioned upon the Sale of Poultry Parts, Irrespective of Whether or Not an Excessive Price was Charged for the Latter, Whereas the Sole Issue under the Price Control Act of 1942 and Regulations in Force at the Time of the Alleged Violations was Whether or Not an Excessive Price was Charged for the Poultry Parts when Sold with Poultry for which Ceiling Prices Were Charged. The Informations Were Therefore Wholly Insufficient, and it was Clear Reversible Error to Try the Case on Such a Basis ..... 21

(1) The issue which ought to have been tried was whether or not an excessive or above-ceiling price was charged for the poultry parts ..... 24

(2) The issue which was tried under the rulings of the trial court was not the issue which ought to have been tried ..... 28



II—A Corporation, as Principal, May Not, under the Doctrine of *Respondent Superior*, or Otherwise, be Convicted of a Criminal Offense Required to be Wilfully Done, by Reason of the Acts of its Inferior Agents, Which No Governing Officer has had Knowledge of Nor has Directed, Authorized or Acquiesced in ..... 32

(1) The Facts ..... 32

(2) The Applicable Rule of Law ..... 33

(3) Application of the civil doctrine of *respondent superior* to a criminal case is particularly inappropriate when what the statute prohibits is wilful violation or when it requires a specific intent ..... 39

(4) The analogous punitive damage cases, in which the law is also thoroughly settled to the effect that the wilfulness of an inferior agent cannot be imputed to his corporate principal . 42

(5) The Cases Relied on by the Government .... 48

(6) Conclusion ..... 50

III—It was Reversible Error for the Trial Court to Deny, Without Exercising any Discretion, the Motion of Defense Counsel for Permission to Examine Prior Sworn Statements Shown to and Read by Witnesses upon the Trial, and from which Parts Selected by the Prosecutor were Read to the Jury ..... 52

IV—The Cumulative Sentences, in the Amount of \$2,500 Each, Which were Imposed upon Nine Counts of the Two Informations upon which the Petitioner Corporation was Found Guilty, Ought to be Set Aside in view of the Fact that the Prosecutor Incorrectly told the Jury that the Maximum Fine upon Each Count was \$1,000 and suggested that it was Not Customary to Impose Cumulative Sentences .....	57
CONCLUSION .....	59

## CITATIONS

*Cases:*

Aetna Life Insurance Co. v. Brewer, 12 F. (2d) 818 (Ct. App., D. C., 1926) .....	48
(The) American Tobacco Co. et al. v. U. S., Nos. 18, 19 and 20, October Term, 1945 .....	26
(The) Amiable Nancy, 3 Wheat. 546 .....	43, 47
Bank of Palo Alto v. Pacific Postal Tel. Cable Co., 103 Fed. 841 (C. C. N. D. Cal., 1900), aff'd. 109 Fed. 369 (C. C. A. 9th, 1901) .....	47, 48
Berger v. U. S., 295 U. S. 78 .....	58
Bowles v. Lee's Ice Cream (Ct. of App., D. C., 1945), 148 F. 2d 113 .....	50
Brasfield v. U. S., 272 U. S. 448, at p. 450 .....	58
Chisholm v. Doulton, 22 Q. B. D. 736 (1889) .....	37
Commonwealth v. Jackson, 28 Atl. (2d) 894 (Pa., 1942) .....	41
Commonwealth v. Mixer, 207 Mass. 141, 146 (1910) .....	41
Crawford v. U. S., 212 U. S. 483, at p. 194 .....	58

Denver & Rio Grande Ry. v. Harris, 122 U. S. 597, 608 . . . . .	47
Direct Sales Co. v. U. S., 319 U. S. 703, at p. 711 . . . . .	40
Duncan v. Seeley, 34 Mich. 369 . . . . .	56
Gilmer v. Higley, 110 U. S. 47 . . . . .	57
Grant Bros. Construction Co. v. U. S., 114 Pac. 950 (Ariz., 1911) . . . . .	41
Hardcastle v. Bielby (1892), 1 Q. B. 709 . . . . .	37
Hargrove v. U. S., 67 F. (2d) 820 (C. C. A. 8th, 1933) . . . . .	41
Hern v. Nichols, 1 Salk. 289 (1708) . . . . .	35
Lake Shore & Michigan Southern Ry. Co. v. Prentice, 147 U. S. 101 (1893) . . . . .	42-47
Lovelace v. State, 2 So. (2d) 796 (Miss., 1941) . . . . .	41
Memphis Telephone Co. v. Cumberland Telephone & Telegraph Co., 231 Fed. 835 (C. C. A. 6th, 1916) . . . . .	48
Mexia v. Oliver, 148 U. S. 664 . . . . .	57
Minnisohn v. U. S., 101 F. (2d) 477, 478 (C. C. A. 2nd, -1939) . . . . .	49
Morris v. U. S. (C. C. A. 5th, 1906) . . . . .	55-56
New York Central R. R. Co. v. Johnson, 279 U. S. 310, at pp. 318, 319 . . . . .	58
New York Central Railroad Co. v. U. S., 212 U. S. 481 . . . . .	48-49
Norfolk & P. Traction Co. v. Miller, 174 Fed. 607 (C. C. A. 4th, 1909) . . . . .	47
Pacific Packing & Navigation Co. v. Fielding, 136 Fed. 577 (C. C. A. 9th) . . . . .	47
People v. Canadian Fur Trappers' Corporation, 248 N. Y. 159, 161 N. E. 455 . . . . .	41
People v. Doble, 265 Pac. 184 (Cal., 1928) . . . . .	41
People v. Green, 133 Pac. 334 (D. C. App. Cal., 1913) . . . . .	41

	PAGE
(The) Queen v. Holbrook, 4 Q. B. D. 42, 46, 47, 51 (1878) .....	36-37
Rex v. Huggins (1730), 2 Strange 882; 2 Lord Raymond 1574 .....	36
(The) Seven Brothers, 170 Fed. 126 (D. C. R. I.) .....	47
State v. Pinto, 29 Atl. 2d 180 (N. J., 1942) .....	42, 51
State v. Shedoudy, 118 P. 2d 280 (N. M., 1941) .....	41
State v. Woolsey, 259 Pac. 826 (Mont., 1927) .....	41
U. S. v. Atkinson, 297 U. S. 157, at p. 160 .....	58
U. S. v. Burroughs, 65 Fed. 2d, 796 (C. App. D. C., 1933) .....	40
U. S. v. Corlin, 44 F. Supp. 940 (D. C. S. D. Cal., 1942) .....	41
U. S. v. Falcone, 311 U. S. 205 .....	40
U. S. v. Food & Grocery Bureau of Southern California, 43 F. Supp. 966 (D. C. S. D. Cal., 1942) .....	41
U. S. v. Socony-Vacuum Oil Co., 310 U. S. 150, at pp. 231-7 .....	53-55
U. S. v. Wilson, 59 F. (2d) 97 (D. C. W. D., Wash., 1932) .....	50
Vicksburg, etc. R. Co. v. O'Brien, 119 U. S. 99 .....	57
Zito v. U. S., 64 F. (2d) 772, at p. 775 (C. C. A. 7th, 1933) .....	49-50
<i>Statutes, Regulations and Miscellaneous:</i>	
Blackstone, Commentaries *38 (1769) .....	36
16 Corpus Juris 123 .....	38
Emergency Price Control Act of 1942 (56 Stat. 23) as amended, 50 U. S. C. App. Supp. IV, 901 <i>et seq.</i> 2, 3, 4-5, 6, 22, 24, 25, 26, 28, 39, 51	

Judicial Code, as amended by Act of Feb. 13, 1925, Sec. 240(a), (43 Stat. 938, 28 U. S. C., Sec. 347a) . . .	2
M. P. R. No. 152 . . . . .	25
M. P. R. No. 181 . . . . .	25
M. P. R. No. 207 . . . . .	25
M. P. R. No. 226 . . . . .	25
M. P. R. No. 269 . . . . .	2
M. P. R. No. 289 . . . . .	25
M. P. R. No. 306 . . . . .	25
Mechem on Agency, Vol. 2, Second Ed., Sec. 2006 . . . .	38
Paley, Principal and Agent (1812) 195-96 . . . . .	36
Plowden's Reports Part II (1st Ed. by Tottell, 1578) . .	36
Rev. M. P. R. No. 169 . . . . .	25, 27
Rev. M. P. R. No. 269 . . . . .	2, 6, 24
Rev. M. P. R. No. 287 . . . . .	25
Rev. M. P. R. No. 330 . . . . .	25
Sayre, "Criminal Responsibility for Acts of Another" (1930), 43 Harvard Law Review 689 . . . . .	33-39, 50-51
Second Rev. M. P. R. No. 269 . . . . .	26
Senate Report, No. 931, 77th Cong., 2nd Sess., Jan. 1, 1942 . . . . .	39
Wigmore, Evidence (2nd Ed.), sec. 762 . . . . .	55

### *Court Rules:*

Rules XI, Rules of Practice and Procedure after Verdict, etc. . . . .	2
--	---

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1945

M. KRAUS & BROS., INC.,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

No. 198

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF FOR PETITIONER**

**Opinion Below**

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals, and the dissenting opinion of Hincks, *D.J.*, are reported in 149 Fed. 2nd 773 (R. 271-6, 277).

**Jurisdiction**

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C., Sec. 347a), and as modified, pursuant to the Act of March 8, 1934 (48 U. S. C., Sec. 688), by Rule XI of the Rules of Practice and Procedure after verdict in criminal cases (292 U. S. 661, 666).

The judgment of the Circuit Court of Appeals was entered on May 31, 1945 (R. 278). The petition for writ of certiorari was filed on July 5, 1945. It was granted on October 8, 1945 (R. 279).

## Questions Presented

The petitioner corporation was convicted for selling turkeys and chickens above wholesale ceiling prices to certain retail butchers during the three days prior to Thanksgiving, 1943. In all cases the prices charged therefor were concededly the official ceiling prices established by the Price Administrator under the Emergency Price Control Act of 1942. (Government brief in opposition to Petition for Certiorari, p. 5.)

A regulation of the Price Administrator (Sec. 1429.5 of Maximum Price Regulation No. 269 issued November 7, 1942, which was re-issued as Revised M. P. R. No. 269 on December 18, 1942, and was re-issued with amendments on October 8, 1943\*, prohibited evasion of price limitations by direct or indirect methods, but did not, unlike many other similar regulations relating to other commodities which had been issued from time to time since the commencement of price regulation, specifically prohibit tying-agreements, conditioned sales or combination sales.

In connection with each sale of poultry, upon which petitioner corporation was convicted, certain of its subordinate employees offered to sell poultry parts, admittedly useful in food-making, consisting of chicken feet and chicken skin\*\*. In each case the offer was accepted without question, and no request to buy the chickens or turkeys separately was made by any purchaser. The goods were then billed and delivered. No ceiling prices had been fixed by the Price Administrator at the time for either chicken feet or chicken skin.

\* 7 Fed. Reg. 9202, 9204; 10768, 10769; 8 Fed. Reg. 13813, 13814.

\*\* Chicken gizzards were originally involved in the case, but are of no present interest because they were sold only to a witness whose testimony the jury flatly rejected in acquitting upon the counts involving sales to him (R. 245).



The case was tried throughout on the theory that the offense was, as charged in the Informations (A. 2-9), the conditioning of the sale of poultry upon the simultaneous purchase of chicken feet or chicken skin unwanted by the purchasers. Aside from the simultaneous sales of the poultry and poultry parts, the proof offered in support of these allegations consisted of testimony on the part of some retail butchers to the effect that they had not sold the greater part of the chicken feet and chicken skin purchased.

The trial court refused to permit the defense to rebut this testimony as to lack of demand for chicken feet and chicken skin, or to prove that such poultry parts had been sold to the original purchasers at prices which were not excessive, which proof it offered to make through many witnesses familiar with market demand and prices. This rejection of evidence was on the theory that the sole issue in the case was whether or not the purchasers had been required to purchase secondary poultry commodities for which they had no substantial use (R. 39, 161-4).

The first question presented, therefore, is whether the trial court committed reversible error in sustaining the Informations which framed the issue without respect to the excessiveness *rel non* of the prices charged for the poultry parts, and in thereby refusing to permit the defense to establish, if it could, that a price which was not excessive had been charged for the poultry parts, for which no official ceilings had been established.

Assuming that the first question presented is answered in the negative, the second question presented is whether the petitioner corporation was properly convicted for wilfully selling and delivering articles in violation of the Price Control Act of 1942, in view of the fact that no witness testified that any officer of the corporation or even that any branch manager thereof had made the allegedly conditioned sales to him.

The third question presented arose as follows: The prosecutor attempted to refresh the recollections of three of his witnesses by having them read affidavits purportedly given by them prior to the trial either to O. P. A. investigators or to himself, and also read, over the objection of defense counsel, selected questions and answers therefrom to the witnesses in the presence of the jury. The trial court denied the request of defense counsel (R. 91) to examine these papers, and explicitly stated that he did so, not in the exercise of discretion, but because in his view the prosecutor had an absolute right to thus proceed (R. 91). The questions and answers read by the prosecutor in the presence of the jury disclosed that the interrogation by affidavit involved a number of close distinctions, such as that between M. Kraus & Bros., Inc. and M. Kraus personally. The context, if defense counsel had been permitted to examine it, might easily, therefore, have reconciled the answers of the witnesses upon the trial and before the trial, to the extent, if any, that they differed. It might also have suggested that these ill-educated witnesses, who did not write out their own affidavits, had been imposed upon by O. P. A. investigators, over-anxious, for some reason or other, to convict Max Kraus personally.

The fourth question presented arose as follows: In summing up to the jury the prosecutor told it that the maximum fine upon each count was \$1,000 (R. 233), whereas in fact it was \$5,000, and the trial court actually imposed a fine of \$2,500 upon each of the nine counts upon which verdicts of guilty were found.

### **Statute and Regulation Involved**

The Emergency Price Control Act of 1942, 56 Stat. 23, as amended, 50 U. S. C. App., Supp. IX, 901 *et seq.*, provides in pertinent part:

"SEC. 2.(a) Whenever in the judgment of the Price Administrator \* \* \* the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and effectuate the purposes of this Act.

"SEC. 2.(b) The powers granted in this section shall not be used or made to operate to compel changes in the business practices, cost practices or methods, or means or aids to distribution, established in any industry, except to prevent circumvention or evasion of any regulation, order, price schedule, or requirement under this Act.

"SEC. 4.(a) It shall be unlawful \* \* \* for any person to sell or deliver any commodity, \* \* \* in violation of any regulation or order under section 2 \* \* \*."

"SECS. 203 and 204 provide for a protest and review procedure, which, if not availed of within the times specified, precludes attack upon the validity of a regulation.

"SEC. 205.(b) Any person who wilfully violates any provision of section 4 of this Act \* \* \* shall, upon conviction thereof, be subject to a fine of not more than \$5,000, or to imprisonment for not more than two years in the case of a violation of section 4(c) and for not more than one year in all other cases, or to both such fine and imprisonment. \* \* \*"

"Sec. 205.(a), (c) and (f) provide respectively for injunctions against violations, triple damage suits (\$50 plus

reasonable attorney's fees and costs, minimum), and licensing, as sanctions to enforce the Act.

Revised Maximum Price Regulation No. 269, in effect during November, 1943 (8 Fed. Reg. 13814), provides in pertinent part:

"SEC. 1429.5. *Evasion*.—Price limitations set forth in this Revised Maximum Price Regulation No. 269 shall not be evaded whether by direct or indirect methods, in connection with any offer, solicitation, agreement, sale, delivery, purchase or receipt of, or relating to, the commodities prices of which are herein regulated, alone or in conjunction with any other commodity, or by way of commission, service, transportation, or other charge, or discount, premium, or other privilege or other trade understanding or otherwise."

### Statement

The petitioner corporation and its president, Max Kraus (R. 177), who was also its controlling stockholder, were charged in an Information containing six counts (C117-64) with "unlawfully, wilfully and knowingly" evading, in contravention of a regulation of the Price Administrator, the provisions of a maximum price regulation promulgated under the Emergency Price Control Act of 1942, by "demanding, compelling and requiring" purchasers of poultry to buy certain quantities of poultry parts in order to obtain the poultry (R. 25).

A second Information (C117-65) charged six additional violations of the same character to the petitioner corporation only (R. 6-9).

*In neither of the Informations was it alleged in any count that an excessive or above-ceiling price was charged for the poultry parts. All of the transactions were alleged to have taken place in November, 1943, all but two, (on*

which there were acquittals) during the three days preceding Thanksgiving, 1943. The two Informations were consolidated for the purposes of trial.

No proof was offered upon count 5 of the first Information (C117-64), and it was dismissed on motion of the Government at the end of its case (R. 159). The individual defendant, Max Kraus, the president and controlling stockholder of the petitioner corporation, was acquitted by the jury upon all of the remaining counts of the first Information, which alone named him as a defendant (R. 245). The petitioner corporation was acquitted by the jury (R. 245) on counts 1 and 2 of the second Information against it alone (C117-65). It was convicted upon all of the remaining counts of the second Information, to wit, counts 3, 4, 5 and 6, and upon all five counts of the first Information (C117-64) which the trial court had not dismissed (R. 245).

In summing up to the jury the prosecutor, without being corrected by the court, advised the jury that the maximum fine upon any count would be \$1,000 (R. 233). In fact it was \$5,000. The court fined the petitioner corporation \$2,500 on each of the nine counts upon which it was convicted, and provided that the sentences should be cumulative (R. 246-7). This made a total of \$22,500.

Petitioner corporation was a wholesale dealer in meat and poultry (R. 164-5). Before the war its gross business had run from 7 to 7½ million dollars a year (R. 178). By 1943, by which time, as is common knowledge, "black marketeers" in meat had greatly increased their volume of business, its business had declined to about 4 million dollars a year (R. 178). Max Kraus, the individual defendant, at the time of the trial was 65 years old. He had been in the meat and poultry business for 37 years, and the petitioner corporation, M. Kraus & Bros., Inc., had been in business 20 years (R. 164-5).

The petitioner corporation had two places of business.

As alleged in the Informations, its principal place of business was at 20 Tenth Avenue, New York City, at which the general administrative offices were located, together with a railroad siding for receiving deliveries by rail. A branch establishment, devoted solely to the handling of truck shipments of poultry, was located at 410 West 14th Street, at Ninth Avenue, New York City. At the Tenth Avenue place all kinds of meat and provisions, as well as all poultry coming in by rail, were handled, and there existed separate departments for the handling of beef and lamb with a manager in charge of each (R. 166). The head salesman at the 14th Street branch was Nathan Lotto, and the sales manager at the main office, Tenth Avenue, was William Harris (R. 165-6). It does not definitely appear from the record how many employees petitioner corporation had, but one witness testified there were "15 or 20, maybe 30", that "it was like Swift & Co." (R. 93). In fact there were about 35.

Max Kraus, as President and controlling stockholder of petitioner corporation, occupied himself with administrative duties. Persons who came down to buy poultry or meats would not ordinarily come in contact at all with him or with the administrative force, since the administrative offices were located on the floor above the ground floor. Max Kraus himself had not sold any meat or poultry or poultry parts in 20 years (R. 167). He had been the sole New York representative appointed by the American Meat Association upon the national industry committee functioning with the O.P.A. in Washington (R. 167-8). He had been president of the Marketmen's Association of the Port of New York which had to do with the poultry and meat industries (R. 220). Five witnesses of high standing in the business world, including officials of a number of nationally known concerns which had done business with him for long periods of time, testified that his reputation

for obedience to law and truth and veracity was "excellent", "splendid", and "no one with a better reputation" (R. 216-228).

The Government's case was based upon the testimony of seven retail butchers in the City of New York who had purchased poultry and poultry parts from M. Kraus & Bros., Inc. during the month of November 1943; and, with the exception of one witness upon whose transactions the jury acquitted, during the three days preceding Thanksgiving 1943, to wit, November 22, 23 and 24, 1943. Only one of these witnesses testified explicitly that the sale of poultry to him had been conditioned upon the sale of poultry parts which he had said he did not want. This witness, Abraham Mandel, was also the only witness who testified that his dealings, in respect of the allegedly conditioned sales, had been with anyone who was not clearly a subordinate employee of the petitioner corporation, he having testified that he had dealt with Nathan Lotto, variously described by him as the bookkeeper and manager at the 14th Street branch (R. 17). The jury categorically rejected the testimony of this witness\* when it acquitted upon counts 1 and 2 of the second Information (C117-65) (R. 245).

The Government also suggested that certain of its witnesses had dealt with Max Kraus individually, who was apparently named as a defendant in the first Information (C117-64) on this theory. Two of the witnesses named in this Information, Harry Moskowitz and Max Braverman, denied that they had dealt with Max Kraus individually (R. 89, 92, 99-100, 112, 116, 119, 128-130, 135, 140). The other witness, Samuel Zweben, was asked no more than whether he *saw* Max Kraus on November 22 or November

\* Mandel was on probation upon a suspended sentence of six months, imposed upon him for an O.P.A. violation (R. 46).



24. He testified that he did not speak to him (R. 153). In view of Max Kraus' position as head of a concern doing many millions of dollars gross business a year, it is absurd to suppose that he was waiting on retail butchers to sell them poultry parts when their total purchases thereof amounted to less than \$200 (R. 3-9).

The transactions allegedly had by the witness Abraham Mandel were charged to the corporation only (Information C117-65), indicating that the statements he must have given to the O.P.A. investigators and to the prosecuting attorney did not implicate Max Kraus personally. Nevertheless, this witness stated that on one of the occasions, when he said he was doing business with Nathan Lotto, Max Kraus "happened to be in the office there", and volunteered the conclusion, "to see just what was going on, what Mr. Nathan was doing" (R. 18). Almost immediately, however, this witness qualified his statements by saying "if I recall", and "*I think that Mr. Kraus \* \* \* knew just what was going on*" (R. 18). (Italics ours.)

The Government's witnesses, other than Abraham Mandel (whom the jury flatly disbelieved), all testified to much the same effect as to the character of their transactions, in respect of the allegedly conditioned sales, with subordinate employees of the petitioner corporation. They were offered poultry parts, such as chicken feet or chicken skin, at the time they purchased turkeys or chickens. They accepted the offers, were billed for the poultry parts, accepted delivery, and paid therefor. None protested, offered to return the poultry parts, or asked to buy turkeys or chickens separately (R. 54-8, 60, 67-68, 70, 74-75, 80, 85-87). One of the witnesses, Samuel Zweben, testified that he was asked "How about some chicken skin?" and "How about some chicken feet?", and that he said on both occasions, "I will take some" (R. 144-5, 150). Another of the witnesses, Harry Moskowitz, testified that his father had previously given

the order on the telephone, and that he went down to the Kraus establishment simply for the purpose of picking up what his father had ordered. Thus he did not know of his own knowledge what had been ordered. The Government did not call his father as a witness (R. 108-113).

All of the Government's witnesses (with the exception of Abraham Mandel whom the jury disbelieved) testified that they had some demand for the poultry parts which they had purchased at or about the price they had paid for the parts (R. 107, 87-88, 58-9, 69-70, 72-3, 76-7, 145, 154). Abraham Mandel had testified that some people, particularly Jewish people, were accustomed to using chicken feet as stock to make the soup richer (R. 28). Jules Klein corroborated this testimony (R. 72). There was no dispute on the point. Likewise, as to chicken skin, the testimony was undisputed that the fat to be derived therefrom was a useful edible product customarily employed in the making of chicken salami and patties, and in place of lard (R. 184).

Under war conditions there was a big demand for anything edible (R. 107, 87-88, 59-60). Gizzards, for example, were being sold not only for human consumption but for animal food (R. 60). One of the Government's witnesses, Max Braverman, testified that in the very poor neighborhood in which his store was located there was no question but that he could sell whatever he could get, and that he in fact sold all of the chicken feet he purchased from the petitioner corporation (R. 87-88). The other Government witnesses, however, testified that they were unable to sell or did not bother to sell the bulk of the poultry parts purchased, but gave them away to customers, restaurants, charitable institutions or fat renderers. Two of the Government's witnesses (including Abraham Mandel whom the jury did not believe), testified that they had dumped their purchases of poultry parts (R. 112, 25).

During the testimony of the first witness, when discussion

was taking place concerning whether or not there was an official ceiling price on gizzards at the time they were sold to Abraham Mandel, the trial court said, "Does the price of gizzards or its coverage\* have anything to do with this case? As I understand it, your client is charged with having forced this man to buy gizzards in order to bill up the price. I don't care whether they are covered by the regulations or not. He is not charged with violating the price of gizzards but billing up the price of chickens" (R. 38). The prosecutor then said, "The issue here, I think your Honor, is whether the produce was wanted or wasn't wanted, so what the ceiling is I do not think is connected to this case at all \* \* \*." The trial court definitely agreed with this because when defense counsel read into the record a ceiling price for gizzards which he mistakenly claimed was in effect at the time of the trial, the court said, "*Well, I have no interest in that. I wouldn't care if it was fifteen dollars*" (R. 39). (Italics added.)

In opening to the jury the prosecutor had said that there was just one issue of fact in the case, "Was this defendant a black market operator or wasn't he? Did he sell turkeys and chickens above the ceiling, or didn't he? That is all there is, there isn't any more" (R. 13).

After the prosecution had been permitted to introduce its testimony concerning the alleged worthlessness of chicken feet, gizzards and chicken skin, and the lack of demand therefor, the defense called David M. Bungard, a retail butcher who had bought chicken feet and chicken skin from the petitioner corporation (R. 161). The trial court asked why the testimony was being put in and what it was supposed to prove. Defense counsel said (R. 162), "I in-

---

\* Actually there was no regulation fixing the ceiling price of gizzards in November, 1943. Defense counsel's statement in this connection must be taken to relate to a later time.

tend putting in testimony here) to show that there is and has been a demand for chicken skins, chick... feet, gizzards, that they are customarily sold; that they are bought; that they are dealt and traded in. The Government has inferred through all of its testimony that chicken skin and chicken feet are so much waste, that they are dumped; that they are not used and they have opened up the door to this type of testimony." The trial court said it would sustain an objection to this testimony, and the prosecutor thereupon objected (R. 162).

The witness was then asked whether he sold chicken feet in his store, and he testified that he did. The prosecutor objected, and the court sustained the objection (R. 162).

Defense counsel then said, "Again I call to your Honor's attention the fact that similar testimony from the opposite viewpoint, that chicken feet are not in demand, was offered and allowed in evidence" (R. 162). The trial court said, "I do not think the Government ever put in issue whether or not there was a demand for chicken feet. There has been a demand for chicken feet for some purpose or other. *The only thing we are concerned with is whether or not the witnesses who testified purchased chicken feet to meet a demand in their stores*" (R. 162). Defense counsel observed that he did not think this was the question in the Information. The trial court said, "Well, maybe you don't think so but that is going to be the question in this case. (Italics added.) Now I have sustained an objection to this kind of testimony. You have an exception in the record, and there is no use wasting any time about it." Defense counsel excepted (R. 162-3).

Defense counsel then asked a ruling "before I take the time of this court in putting on any number of witnesses who would testify to a similar condition in their neighborhood, as to their demand in those particular neighborhoods for such items as chicken feet, chicken skin, gizzards and the

like: I should like to know whether your Honor's ruling is going to be the same in all those cases, in all those instances, and whether it is necessary for me to put all these men on the stand and question them all individually and have the same objections" (R. 163). (Italics added.)

The trial court ruled, "*It is not only unnecessary but I direct you not to do it. The meaning of my ruling is perfectly clear. It is entirely unnecessary to repeat it*" (R. 163).

Defense counsel then called Benjamin W. Reiner (R. 163), a retail butcher, and asked him if he had purchased any chicken feet from Kraus. The prosecutor objected, and the court sustained the objection, saying, "*Did you understand what I said?*" Defense counsel said, "*You said 'sustained'. I understood that your rulings were going to be the same in all of these witnesses that I put on the stand, yes.*" The trial court then said, "*Well, didn't you hear me tell you that I direct you not to put them on the stand; that I have given you an exception to the ruling to any such testimony?*" Defense counsel replied, "*I did not hear that portion of your statement, I am sorry. Now that I understand you perfectly on that, I will not put any other witnesses on the stand to testify to that effect*" (R. 164). (Italics added.)

The defendant Max Kraus then testified. He stated that chicken feet and chicken skin and chicken and turkey gizzards and all sorts of poultry parts were sold in his place (R. 168-9). He stated that he had bought gizzards and chicken skin, and said that the concern processed chicken feet itself (R. 169). He denied having had any dealings with any of the witnesses mentioned in the Informations in respect of having personally sold them poultry or poultry part. (R. 170-174). *He denied ever having/instructed salesmen or any one else working for him to make the acceptance of poultry parts a condition of the sale of poultry* (R. 177).

On cross examination he was asked about market prices of chicken skin and chicken feet and the demand therefor, and testified that there was a solid demand for chicken skin at 30¢ a pound, and that during the war the general public was willing to buy chicken feet for soup and that they were used to make gelatines and for chicken feed (R. 182-7).

The defense thereupon recalled David M. Bungard (R. 194), and he was allowed to testify as to the price he himself obtained for chicken feet (R. 195) which was from 15 to 20¢ a pound. He further testified that he tried to get chicken feet, and knew that they were sold in other stores throughout the city. He was not familiar, however, with the price of chicken feet as sold by other stores (R. 195).

Nathan Lotto was the last witness for the defense (R. 197). He testified that he more or less managed the 14th Street branch (R. 197). He denied having participated in any of the transactions alleged in the Information upon which the jury convicted (R. 199-203). He testified that he never refused to sell any customer chickens because he would not take chicken feet, gizzards or chicken skin (R. 198, 203). He admitted sometimes asking customers to buy chicken feet or chicken skin when the customer asked for chickens (R. 198-9). He never required anybody as a condition of a sale of poultry to them to buy chicken feet or gizzards, and no other employee in his presence did so. Max Kraus never told him not to sell chickens or turkeys unless he could sell chicken feet, skin or gizzards with them (R. 203).

The chicken skin sold by the petitioner corporation was bought from the Blue Diamond Poultry & Egg Company. Max Kraus testified to his belief that the corporation paid 23½ or 24½¢ a pound for it, and stated that he had the bills with him (R. 181). It was sold for 30¢ a pound (R. 185<sub>4</sub>). Chicken skin is a by-product which is taken off by



the people which pack poultry in cans for the Government (R. 192). Petitioner did no skinning of chickens (R. 181).

All of the poultry sold by Kraus as alleged in the Informations was in the O.P.A. category "dressed" poultry, and therefore was sold with the feet on. The chicken feet, which are the subject matter of the sales alleged in the Informations, were obtained by petitioner corporation from its processing of other poultry (R. 180-181). Chicken feet in large supply were not available prior to the war but came into supply coincident with the demand for poultry parts evidenced by the opening of stores exclusively devoted to the sale of cut-up poultry (R. 186, 193-4, 78-79).

The Government, in examining its witnesses Max Braverman, Harry Moskowitz and Samuel Zweben, attempted to refresh their recollections and impeach them by the use of prior affidavits allegedly contradictory to their testimony at the trial. These affidavits were marked for identification but were not received in evidence and have not been reproduced in the printed record. Enough appears therein, however, to show their general tenor and the prosecution's objectives in employing them, but certainly not enough to justify the strictures in the prevailing opinion of the Circuit Court of Appeals based upon the assumption that the O.P.A. investigators who wrote out the affidavits reproduced the witnesses' statements and purport with complete fidelity, and the further unjustified assumption that such affidavits became affirmative evidence in the case.

In the case of the witnesses Braverman and Moskowitz the principal objective was to obtain an admission that, contrary to their positive testimony on the trial, they had dealt with Max Kraus personally in the matter of the allegedly conditioned purchases, a very unlikely fact, as we have pointed out. Another objective was to contradict the testimony given on the trial as to the willingness of the witnesses to accept the poultry parts. Both of the witnesses refused



to change their testimony on the basis of the prior affidavits, and insisted that when they referred to Kraus or M. Kraus or Max Kraus, they meant the concern and not Max Kraus individually, a most likely explanation. In the case of the third witness no attempt was made to get him to testify to more than the fact that he had seen Max Kraus at the time of his transactions. During the examination of these witnesses many of the questions and answers previously alleged to have been given by them were read in the presence of the jury (R. 116-121).

During the examination of Max Braverman, he was shown Government exhibit 13 for Identification, which the prosecutor claimed was a prior affidavit of the witness. Defense counsel asked that he be permitted to examine the statement, referring to the *Society-Vacuum* case, and to this Court's observations therein as to discretion. The trial court said (R. 91), "I haven't been exercising any discretion. I would hold that the United States had an absolute legal right to insist on doing precisely what it has done. I will deny your application, which I understand is for permission to read what the witness has read." Defense counsel said, "My application is to read then the original affidavit allegedly signed by that witness on which those questions and answers are based." The trial court replied, "*I do not even know that there was an affidavit signed by him. I deny your application no matter how you phrase it, if it is to read the matter that has just been presented to the witness.*" Defense counsel took an exception (R. 91). (Italics ours.)

After Max Braverman had left the witness stand, the Government called an O.P.A. investigator who testified that he had taken Max Braverman's affidavit on December 31, 1943, and identified Government's exhibit 13 for Identification as being such affidavit. The answers had been written down not by Max Braverman but by the O.P.A. investigator. For the first time the Government then offered the affidavit

in evidence, it then being too late to employ it upon the cross-examination of Max Braverman. The court excluded the affidavit (R. 100-103).

In the subsequent examination of Harry Moskowitz a similar affidavit was employed, with access thereto refused to defense counsel, and defense counsel's objections to the reading in the presence of the jury of questions and answers therefrom was overruled (R. 115).

In summing up to the jury the prosecutor referred to these affidavits as being documents "in which it was said that Max Kraus either was there, officiated, attended or was aware of the sales" (R. 233). The court stated to the jury that he was allowing this as "an explanation bearing on Max Kraus' knowledge", at the same time instructing them "that as a statement of fact the contents of those statements, if they were made, are not before you as the District Attorney's statement as to what they contain is not to be considered by any of you" (R. 234). Here, of course, one statement canceled out the other.

Both at the conclusion of the Government's case and at the conclusion of the whole case the defendants moved to dismiss the various counts in the two Informations for failure of proof and failure to set out sufficient causes of action (R. 157-160, 228-9).

In summing up the prosecutor strongly emphasized to the jury that he had claimed that the price of chicken feet was 3 to 5¢ a pound and had done it five times (R. 230). There was no evidence to support this statement. He also stated to the jury that the maximum fine upon each count was \$1,000, without the trial court correcting the statement (R. 233).

In charging the jury the trial court said of the evidence which we here contend was the most important, material and relevant evidence conceivably available to the defense (R. 236): "There was a complaint made that I excluded evi-

der or something that could have been proved. *The law of evidence excludes all claptrap and poppycock.* Anything else is admissible. The best illustration I can give is right before you as a jury, where I first excluded one butcher from talking about his sales of chicken feet, and because subsequent testimony made an issue of what he was going to testify to, if you will remember, I allowed him to be recalled to testify. I have excluded no evidence, but I have excluded all claptrap; that is why I am here, to exclude that. You are not to assume that any injustice has been done anybody because I did not do any injustice" (Italics ours).

Contrary to the statement in the prevailing opinion of Evans, C.J. (R. 276), an exception was expressly reserved to this part of the charge (R. 243):

On the other hand, the trial court told the jury with respect to the Government's testimony in the same connection that "the use that can be made of them (the poultry parts), would enable the jury to determine *whether the prices at which they had been sold were entirely out of line with any value that attaches to them*, so that the prices charged therefor would be *almost entirely profit to the defendants*, and whether in thus selling the additional articles the defendants both realized a greater consideration than the O.P.A. allows for the commodity sold" (R. 241). (Italics added.)

Defense counsel excepted to the portion of the charge wherein the jury was advised that chicken skin, gizzards and feet were useless (R. 243).

The trial court further charged that any salesman has the assumed authority to represent the corporation, and that the corporation is liable for any sale effected by any of them (R. 241).

When the verdict came in, defense counsel moved to set aside as against the weight of the evidence (R. 245).

### Specification of Errors to be Urged\*

The Circuit Court of Appeals erred:

(1) In holding that the trial court correctly ruled that offenses against the United States were sufficiently alleged in each of the counts of the two Informations (R. 272-3, 157-8, 228);

(2) In holding that the motions of petitioner corporation for directed verdicts were properly overruled (R. 272-3, 157-160, 228-9);

(3) In holding (R. 272) that the trial court was justified in finding that there was sufficient evidence to permit the jury to convict petitioner corporation of a wilful violation of ceiling prices, the sales having been made by its inferior agents;

(4) In failing to hold (R. 332) that the trial court committed reversible error in ruling that evidence offered by the petitioner corporation as to the demand for poultry parts and to show the lack of excessiveness in the price charged therefor, was inadmissible (R. 39, 162-4);

(5) In holding (R. 276) that the characterization of the foregoing evidence by the trial court as "claptrap and poppy-cock" was not erroneous, exception thereto having been duly taken (R. 243);

(6) In holding (R. 273-6) that the trial court was justified in refusing, without purporting to exercise any discre-

\* Assignments of Error in the Circuit Court of Appeals, Nos. I, A<sub>2</sub>, B, C & D, II, III, IV, A, D & E, V, VII, VIII (R. 253-267).

tion, to permit counsel for petitioner corporation to examine certain documents shown to witnesses called by the Government for the ostensible purpose of refreshing their recollections (R. 91):

(7) In failing to hold that it was reversible error for the trial court to permit the prosecuting attorney to erroneously advise the jury, without correction, that the maximum fine that could be imposed upon any count was \$1,000 (R. 233) whereas in fact a fine of \$2,500 was imposed on each count;

(8) In holding that the cumulative sentences imposed by the trial court of \$2,500 upon each count were properly imposed, despite the aforesaid statement of the prosecuting attorney to the jury:

## ARGUMENT

### I

The sole issue presented by the informations and tried under the rulings of the Trial Court was whether or not the sale of poultry at ceiling prices was conditioned upon the sale of poultry parts, irrespective of whether or not an excessive price was charged for the latter, whereas the sole issue under the Price Control Act of 1942 and regulations in force at the time of the alleged violations was whether or not an excessive price was charged for the poultry parts when sold with poultry for which ceiling prices were charged. The informations were therefore wholly insufficient, and it was clear reversible error to try the case on such a basis.

It is clear beyond argument that the sole issue presented by the Informations and tried under the rulings of the trial

court was as above stated. The allegations in each count of the two Informations are in the same form. Taking, therefore, the first count in the first Information (C117-64) as typical, it reads as follows (R. 23) :

"That heretofore, to wit, on or about the 24th day of November, 1943, at the Southern District of New York and within the jurisdiction of this Court, M. Kraus & Bros., Inc., a corporation \* \* \*, and Max Kraus, the defendants herein, in connection with the sale by them on said date to Harry Moskowitz of 875 pounds of poultry, \* \* \*, and as an integral part thereof, unlawfully, wilfully and knowingly evaded the provisions of said Revised Maximum Price Regulation No. 269, Sec. 1429.5, by demanding, compelling and requiring the said Harry Moskowitz to purchase a commodity, to wit, 427 pounds of chicken feet at 15 cents per pound as a condition of the sale to him of the aforesaid poultry; \* \* \*"

*There is no allegation whatsoever that either an above-ceiling price or an excessive price was charged for the chicken feet. Thus all that is charged is that the sale of the chicken feet was tied in with or conditioned upon the sale of the poultry. This was the issue and the only issue which was tried under the very explicit rulings of the trial court, despite the fact that the applicable "evasion" regulation did not specifically prohibit combination, conditioned or tied-in sales.*

It is our contention, and we think it is plain, that quite a different issue ought to have been tried in view of the provisions of the Price Control Act of 1942 and the existing regulations of the Price Administrator thereunder, to wit, that the sole issue ought to have been whether or not (in view of the fact that it is conceded that all of the poultry was sold

at the ceiling price) an excessive or above-ceiling price was charged for the poultry parts.

Upon the issue which was tried much evidence was admitted concerning the inability or supposed inability of the retail butchers, who were the Government's witnesses, to dispose of the secondary products they had purchased. Such evidence was unquestionably relevant upon the issue of whether or not the price charged therefor by the petitioner corporation was excessive. No such issue was, however, permitted to be tried, and the evidence in question was accepted solely for the purpose of showing that the Government's witnesses did not willingly buy the secondary products. This was the sole issue which under the rulings of the trial court was tried. The evidence was of course relevant upon this issue.

So defining the issue, the trial court ruled in unmistakable terms that the defendants were not entitled to offer evidence to prove that there was such a demand for the secondary poultry products sold by petitioner corporation that the price charged therefor could not be regarded as excessive. This evidence was in fact clearly relevant and highly material even upon the issue to which the trial court had restricted the trial, because it is plain that the more clearly it should appear that the price charged for the secondary products by the defendants was not excessive, the less likely the claim of compulsion was apt to be true. Certainly the defendants did not have to accept the testimony of the Government's witnesses in this connection as conclusive. Yet that is just what they were required to do.

On the issue which, as heretofore stated, we contend ought to have been tried, the evidence in question was the only method open to defendants of proving the lack of excessiveness in the price charged and of rebutting the testimony of the Government's witnesses tending to show that the prices charged were excessive.



- (1) The issue which ought to have been tried was whether or not an excessive or above-ceiling price was charged for the poultry parts.

The offense under the Price Control Act of 1942 is the sale or delivery of a commodity (Sec. 4a) in wilful violation of the maximum price regulations of the Price Administrator. As the prosecutor pointed out in his opening (R. 13), that is all there is to it. The test is a purely objective one, and not a subjective test from the standpoint of the particular buyer, differing with each buyer, and thus with each case. *The purpose of the Act is to promulgate price standards, not to protect individual purchasers against high-pressure selling or what may turn out to be bad bargains as far as they are concerned.*

Section 1429.5 of the Price Administrator's regulations prohibits evasion of the price limitations set forth in Revised Maximum Price Regulation No. 269 governing poultry

by direct or indirect methods, in connection with any offer, solicitation, agreement, sale, delivery, purchase or receipt of, or relating to, the commodities prices of which are herein regulated, alone or in conjunction with any other commodity, or by way of commission, service, transportation, or other charge, or discount, premium, or other privilege or other trade understanding or otherwise."

There is no specific prohibition against tying agreements or conditioned sales or combination sales. Numerous other maximum price regulations, issued from time to time and going back to the commencement of price regulation, did specifically forbid such methods of selling. Thus in the meat industry itself the "offering, selling or delivering beef, veal or any processed product on condition that the purchaser

is required to purchase some other commodity" was prohibited under the heading "Evasion". Rev. M.P.R. 169, as amended March 30, 1913, Sec. 1364.406, 8 Fed. Reg. 4097, 1099. And in the clothing industry, under the heading "Prohibition", it was provided that "No manufacturer shall make a sale of garments which is conditioned directly or indirectly on the purchase of any other commodity or service." R.M.P.R. 287, issued June 29, 1943, Sec. 15, 8 Fed. Reg. 9122, 9126. The prohibition of evasion by "tying-agreement" was commonplace. A later regulation in the same industry forbade "combination sales" in the following terms, "Every person is prohibited from requiring any purchaser to buy or agree to buy any other article, service, package or wrapper in connection with the sale or delivery of any garment covered by this regulation. Every person is likewise prohibited from making a sale of garments which is conditioned directly or indirectly on the purchase of any other commodity or service." M.P.R. 330, as amended August 7, 1943, Secs. 1389.555, 8 Fed. Reg. 11041, 5.

Thus, if such a prohibition per se, and not as a method of evasion, is to be read into the regulation, those whose only remedy against an invalid regulation is the protest and review procedure provided for in Secs. 203 and 204 of the Act, will have been effectively deprived of any remedy, for it is plain that they could not anticipate any such reading-in.

\* E.G., Canned Vegetables (M.P.R. 152, Sec. 1341.25), effective May 23, 1942, 7 Fed. Reg. 3896; New Formula Condensed Soups (M.P.R. 181, Sec. 1341.39), effective July 18, 1942, 7 Fed. Reg. 5562; Canned Fruits and Berries (M.P.R. 185, Sec. 1341.105), effective July 24, 1942, 7 Fed. Reg. 5774; Frozen Fruits, Berries and Vegetables (M.P.R. 207, Sec. 1341.25), effective August 18, 1942, 7 Fed. Reg. 6600; Fruit Preserves, Jams and Jellies (M.P.R. 226, Sec. 1341.307), effective September 21, 1942, 7 Fed. Reg. 7492; Certain Packed Food Products (M.P.R. 306, Sec. 1341.567), effective January 22, 1943, 7 Fed. Reg. 1116; Dairy Products (M.P.R. 289, Sec. 6), effective December 20, 1942, 7 Fed. Reg. 10906.

The Second Revised Maximum Price Regulation No. 269, effective December 23, 1944, Sec. 1.3, 9 Fed. Reg. 15095, 15096, added the words "by tying agreement" to the prohibition against evasion (Part 1429, Sec. 1.3d). It did not prohibit tying-agreements *per se*. This makes it entirely unnecessary to consider whether or not a *per se* prohibition would be effective,—a very doubtful matter indeed in view of exclusively anti-inflationary purpose of the Act and the prohibition against interfering with established business practices (Sec. 2h).

A reading of the committee reports and debates in Congress in connection with the Price Control Act of 1942, as well as its preamble, shows with great clarity what the purpose of the Act was, i.e., to check inflationary price rises due to heavy defense and war expenditures by the Government and the accompanying severe reduction in the volume of goods available for civilian use.

The act does not guarantee to anyone the right to purchase scarce commodities apart from other commodities in greater supply. In many businesses, prior to the Act, combination sales were a well-established practice, frequently employed to move less-sought-after goods. In the tobacco business, for example, as is shown (R. 4865) by a record now before this Court (*The American Tobacco Company, et al. v. U. S.*, Nos. 18, 19 and 20, October Term, 1945), the so-called drop-shipment or combination offer employed to move lesser-known brands of smoking and chewing tobaccos has been commonly used since 1886.

In the ice-cream business, at least since the war, it has been common practice to offer the public nothing but brick ice-cream, made up of alternate layers of ice-cream and water ice, with the obvious (and we submit desirable) purpose of making the scarcer product go further.

As is well-known, many restaurants for years have fol-

lowed, the practice of offering table d'hote meals without giving the option of buying the various dishes separately. Would it be seriously contended that, in the absence of ceiling prices fixed for the meal as a whole, the sale of such combinations would violate a regulation which merely fixed the price of the entree, if it should appear that the total price charged for the meal was no more than the aggregate of the ceiling price of the entree plus reasonable prices for the soup, dessert, etc.? If not, would the mere fact that the particular patron did not care for soup or dessert, and could not therefore effectively utilize such parts of the meal, change the situation? Though the answer is plainly in the negative, the trial court answers the question in the affirmative (R. 39, 162-3).

Finally, as bearing upon the failure of the Price Administrator to prohibit combination sales of poultry and poultry products, it ought to be clear that the meat industry is peculiarly one in which customers may properly be asked, particularly in war-time, to take some of the less-wanted parts or cuts along with those most in demand\*. A steer weighs from 600 to 800 pounds. It will yield not more than 10 pounds of filet mignon. The other choice cuts come from the ribs, which, including the bones, weigh some 75 pounds, and the short loins, which weigh some 80 or 85 pounds and yield about 15 pounds of porter-house steaks, etc. Thus three-quarters or more of the steer yields the less-desired cuts of meat.

Meat, poultry and poultry parts are of course perishable. The supply thereof is fluctuating. Naturally there is great variation in the relationships between the available amounts of the cuts and parts in greatest demand and the less-desired cuts and parts.

\* It will be noted that the specific prohibition in Rev. M.P.R. 169, referred to above, which regulates the sale of beef and veal, is against conditioned sales of "some other commodity".

Is the seller, under such circumstances, to have his hands tied in attempting to dispose of such less-desired cuts and parts, at prices which are not excessive, along with the scarce choice cuts and articles for which the demand is so great? If the seller's hands are so tied, would this tend to effectuate the purpose of the Act in combatting inflation and in attempting to provide the country with acceptable foods in war-time at reasonable prices? We think it is indisputable that under war conditions the complete utilization of all products useful in food-making is not only highly desirable in the public interest, but is clearly anti-inflationary, in that it increases the supply of food in relation to the amount of money and credit outstanding, and that the Act and regulations, not so specifying, should not be construed to prevent it.

**(2) The issue which was tried under the rulings of the trial court was not the issue which ought to have been tried.**

We have heretofore pointed out that neither Information charged that the price obtained for the secondary products was above ceiling or excessive. The Informations therefore charged offenses, i.e., the conditioning of the sale of poultry upon the purchase of secondary poultry products, which were not in fact offenses either under the Price Control Act or under the regulations issued pursuant thereto. In other words, the prosecution had defined synthetic offenses, and the Informations were clearly insufficient.

At the very outset of the case the trial court recognized that the issue posed by the Informations was as above stated. He therefore ruled, with the concurrence of the prosecutor, that it was immaterial whether or not gizzards had been sold within a ceiling price, going so far as to say he would not care if the ceiling price of gizzards was \$15.00, that it would not make any difference in the case (R. 39). Actual

ly there was no ceiling price for gizzards at the time, so the real question ought to have been whether the gizzards were sold at an excessive price.

This was an important issue even under the theory of the information as recognized by the trial court, because the excessiveness *et non* of the price charged for the poultry parts was very material to the question of whether or not they had been voluntarily accepted by the purchasers.

In offering this testimony, defense counsel said (R. 162). "I intend putting in testimony here to show that there is and has been a demand for chicken skin, chicken feet, gizzards, that they are customarily sold, that they are bought; that they are dealt and traded in. The Government has inferred through all of its testimony that chicken feet and chicken skin are so much waste, that they are dumped, and that they are not used, and they have opened up the door to this type of testimony." The trial court not only sustained an objection by the prosecutor to this testimony and to a specific question asked the witness in this connection but explicitly and definitely ruled that the demand for chicken feet was not an issue and that "the only thing we are concerned with is whether or not the witnesses who testified purchased chicken feet to meet a demand in their stores" (R. 162). He thus applied a purely subjective test, whereas he ought to have applied a purely objective test.

This ruling was in response to a second attempt of defense counsel calling the trial court's attention to the fact "that similar testimony from the opposite viewpoint, that chicken feet were not in demand, was offered and allowed in evidence" (R. 162).

After the court had so ruled, defense counsel for the third time questioned the propriety of the ruling, saying that he did not think that the issue presented by the Informations restricted the testimony to the demand for poultry parts in



the stores of the Government's witnesses (R. 162). The trial court then stated, "Well, maybe you don't think so but that is going to be the question in this case." He told counsel that he had sustained an objection to this type of testimony, that he had an exception and not to waste any more time about it (R. 162-3).

Defense counsel then brought the matter up for the fourth time and asked for an explicit ruling on the entire line of testimony, "before I take the time of this court in putting on any number of witnesses who would testify to a similar condition in their neighborhood, as to their demand in those particular neighborhoods for such items as chicken feet, chicken skin, gizzards and the like. I should like to know whether your Honor's ruling is going to be the same in all those cases, in all those instances, and whether it is necessary for me to put all these men on the stand and question them all individually and have the same objections" (R. 163).

Upon this fourth attempt of defense counsel to have the issue clearly defined, the trial court sternly ruled, "It is not only unnecessary but I *direct you not to do it*. The meaning of my ruling is perfectly clear. It is entirely unnecessary to repeat it" (R. 163). (Italics ours.)

Not completely satisfied with this, defense counsel made a fifth attempt and called Benjamin W. Reiner, a retail butcher (R. 163). When he asked him if he had purchased any chicken feet from Kraus, the prosecutor objected, and the court sustained the objection (R. 164). He not only sustained the objection but sharply remarked, "Did you understand what I said?" Defense counsel said that he understood that the trial court had said "sustained", and that he further understood that all of the trial court's rulings were going to be the same in respect of all of the witnesses that he proposed to put on the stand (R. 164).



• Whereupon the trial court took pains to make certain that defense counsel had fully understood his stern admonition against further attempts in this direction and said, "Well, didn't you hear me tell you that *I direct you not to put them on the stand?*" (Italics ours.) Defense counsel then said that he now perfectly understood and would not put any other witness on the stand to testify to that effect (R. 164).

Nothing more happened in this connection upon the Government's case. When, however, Max Kraus, the individual defendant, was called to testify in his own defense, he was cross-examined about the market prices of chicken skin and chicken feet and the demand therefor. Without in the least changing his ruling, made in the course of the Government's case so definitely and explicitly, as we have pointed out, the trial court permitted David M. Bingard to be recalled and to testify to the price he himself had individually obtained for chicken feet (R. 194-5).

This witness, however, was not qualified to testify as to the demand for chicken feet generally (R. 195). Defense counsel, having in mind the stern admonition of the court which was still in effect (R. 277) and which went to the verge of threatening him with contempt, thereafter attempted to call no witnesses to testify to the demand for chicken feet generally and called no witness at all to testify to the demand for chicken skin. Thus the defense did not have the benefit of the testimony of the numerous disinterested witnesses it had offered to call to testify as to the demand for these products and what could be considered as not being excessive prices therefor.

It is too clear for argument, we submit, that the introduction of such testimony was prevented by the plain and explicit rulings of the trial court previously adverted to. If, therefore, as we believe we have indisputably shown, such

testimony was admissible, there was clear reversible error, since the testimony was plainly of the highest importance and materiality upon what ought to have been the sole issue in the case, if the charge had been legally sufficient, and was indeed highly material to the issue actually tried.

This error was clearly recognized by Hincks, *D. J.*, dissenting, who said (R. 277): "The judge must have overlooked the tendency of such evidence to negative an inference that the sales were made with evasive intent. It was admissible on that fundamental issue, and its exclusion was erroneous." He further pointed out that the error was never cured, despite the slight amount of testimony that was permitted in this connection because "the judge's exclusionary direction was still in effect and the defendant's other witnesses were never heard", presumably being no longer available by reason of their having been excused.

## II

**A corporation, as principal, may not, under the doctrine of *respondent superior*, or otherwise, be convicted of a criminal offense required to be wilfully done, by reason of the acts of its inferior agents, which no governing officer has had knowledge of or has directed, authorized or acquiesced in.**

### (1) The Facts.

Max Kraus, the only governing officer of petitioner corporation whose name is mentioned in the record, was acquitted by the jury. Dealings with purely subordinate agents\* of petitioner corporation, in respect of allegedly

---

\*Three of the witnesses did not even identify the employees who served them (R. 109-110, 56, 68). The others identified them merely as "Charlie", "Oscar", Mr. Blankenstein, Mr. Balter and "Meyer" (R. 84, 86, 75, 144-5, 148), and as bookkeepers or salesmen. The Government called none of these witnesses.

conditioned sales, were the sole basis for the convictions on each and every count. No witness upon any of these counts testified that he had been served, *in respect of such sales*, by an employee even as high in the scale as a branch manager, the dealings of some of them with Nathan Lotto having been restricted to suggestions or inquiries concerning the purchase of turkeys. Thus it is unnecessary to decide whether the acts of Nathan Lotto, in charge of the 14th Street and Ninth Avenue establishment, could bind the corporation without any governing officer participating therein or having knowledge thereof. None of the foregoing witnesses testified that Max Kraus, the President of petitioner corporation, who was the only governing officer thereof mentioned in the record, participated in any of the allegedly conditioned sales or had knowledge thereof. Max Kraus categorically denied that he had ever instructed any employee to make the acceptance of poultry parts a condition of the sale of poultry (R. 177).

The sales, moreover, on which the convictions were obtained, which totalled less than \$200 for the poultry parts, could hardly have been more sporadic or more casual, all of them having taken place during the three-day period prior to Thanksgiving, 1913. Thus it cannot be argued that any imputation of corporate knowledge is properly to be made in this case by reason of the frequency of the offending.

## (2) The Applicable Rule of Law.

Professor Francis B. Sayre, in a thoroughly documented, well-reasoned and scholarly article, entitled "Criminal Re-

\* Lotto, although termed a "manager" of the 14th Street and Ninth Avenue house (which was only a few blocks from the main administrative offices at Tenth Avenue and 14th Street) seemingly held a position more like that of a receiving clerk and salesman for trucked-in poultry. In appraising the propriety of imputing his acts and his state of mind to the petitioner corporation, what counts, of course, is not the name attached to the position but the authority exercised.

sponsibility for the Acts of Another" (1930), 43 Harvard Law Review, 685, discusses the comparatively recent introduction of the doctrine of *respondent superior* in tort law, the development of which he contrasts with what, as he points out, has been the completely different development of responsibility for the acts of another in the criminal law.

At the outset he states (p. 689):

"The problem of the criminal liability of a corporation for the acts of corporate agents depends upon a consideration of two quite distinct problems, one a problem of agency, and the other a problem of the law of corporations."

He notes that the first problem involves the general question of criminal responsibility for the acts of another, and that the question is the same whether the principal is a natural person or a corporation. The second problem involves the entirely distinct question "of when the acts and intent of a natural person, for example of a vice-president or general manager, are to be treated as those of the corporation itself". It is the first question with which his article and our argument is solely concerned.

As noted by Professor Sayre, many courts in recent years have fallen into the error of bodily transferring the doctrine of *respondent superior* from the civil law into the criminal law, thereby imputing the criminal acts and intent of an agent to his natural or corporate principal. This tendency, he observes, apart from the libel and nuisance cases, has been largely, if not exclusively, confined to petty misdemeanor cases not involving imprisonment or other than light fines, particularly the liquor cases. On the other hand, even with respect to the liquor cases, he says:

"An imposing array of cases hold that even in these there can be no liability without proof of authorization or knowledge" (p. 715).

Professor Sayre conclusively demonstrates that the doctrine of *respondent superior* which imposes civil liability upon a master or principal for the acts of his servant or agent, within the scope of his employment and in the course of the business, is of comparatively recent origin. He notes (p. 691) that

"the recorded cases between 1300 and 1700 indicate a growing recognition that the master's liability for his servant's acts should in general be confined to cases where the master specifically commanded or authorized the servant to commit the tortious act or gave his consent to it either before or after its commission."

Shortly before 1700, however, a great change was initiated by the decisions of Lord Holt, and the requirement of an express command or consent with reference to a particular act gave place to a command implied from general authority. Since the principal under this doctrine cannot escape liability even by proving that the tort was committed against his express command, the liability is frequently without fault and quite outside the ordinary principles of causation, which as we shall show are the essential factors in criminal liability. Even Lord Holt, however, drew a sharp line of distinction between criminal and civil liability for the acts of one's agents when, in *Hern v. Nichols*, 1 Salk. 289 (1708), he declared, "that the Merchant was answerable for the deceit of his factor, tho' not *criminaliter*, yet *civiliter*".

The development of the criminal law concerning vicarious responsibility is discussed by Sayre, *ibid.*, pp. 694-701. One who counseled, procured or commanded the commission of a crime through a guilty agent was an accessory before the fact. It was the actor who was the principal, not vice versa as in the tort terminology. Fault and causation were the foundations for the responsibility of the accessory. The

classic statement of the law in this connection, which has furnished the foundations of the criminal law upon the subject with comparatively little change until the present day, is given by Plowden (Sayre, *ibid.*, p. 698).

In *Rex v. Huggins* (1730), 2 Strange 882; 2 Lord Raymond 1574, the question of whether or not the doctrine of implied command, initiated by Lord Holt, should be applied to the criminal law was squarely presented, and definitely decided in the negative. In 1812 when Paley wrote the first treatise which was written on the law of agency, he stated the law almost in the same language as used in *Rex v. Huggins*, in discussing criminal liability for the acts of an agent. This was as follows, *Paley, Principal and Agent* (1812) 195-96:

"The principal is never criminally answerable for the act of his deputy; they must each answer for their own acts, and stand or fall by their own behaviour. To affect the superior criminally by the act of his deputy, there must be the command of the superior for the act in question."

Professor Sayre then points out that "succeeding decisions and text-writers have made it clear that as a general rule the doctrine of *respondent superior* will not serve as a ground of criminal liability" (p. 701).

Of course, as stated by *Blackstone* in his *Commentaries*, the fourth book of which was published in 1769,

"He who in any wise commands or counsels another to commit an unlawful act, is accessory to all that ensues upon that unlawful act; but is not accessory to any act distinct from the other." 4 Bl. Comm. \*38.

In *The Queen v. Holbrook*, 4 Q.B.D. 42, 46, 47, 51 (1878), Lush, J., said:

"The maxim 'respondent superior' \* \* \* with rare exceptions (i.e., cases of public nuisances) \* \* \* pertains to civil liability only \* \* \* If a coachman, accustomed to drive were, while engaged on his master's business, by carelessness or furious driving, to cause the death of another; the master would be liable to an action for damages, but not to a criminal prosecution. The offending servant alone could be charged with the manslaughter \* \* \* Subject to the exceptions already referred to, the criminal law makes no one punishable for an offense but the person who either committed it or incited and procured the other to commit it, or who aided in its commission. \* \* \* Although the employer is liable civilly for such a wrong, this is not upon the presumption of authority but by virtue of the maxim 'respondent superior,' which on grounds of policy and general convenience puts the master in the same position as if he had done the wrong himself, a maxim, which, as I before observed, pertains to civil and not, except in rare instances to criminal liability."

See also *Chisholm v. Doulton*, 22 Q.B.D. 736 (1889), in which Cave, J., said, at 741:

"A master is not criminally responsible for a death caused by his servant's negligence, and still less for an offence depending on the servant's malice."

*Hardecastle v. Bellby* (1892), Q.B. 709, in which Collins, J., said, at 712:

"It is a general principle of law that a man is not liable to be indicted criminally for the act of his servant."



In 16 *Corpus Juris* 123, the rule is stated as follows:

"The civil doctrine that a principal is bound by the acts of his agent within the scope of the agent's authority has no application to criminal law. Therefore, the mere relation of principal and agent, or of master and servant, does not render the principal or master criminally liable for the acts of his agent or servant, although done in the course of his employment; it must be shown that they were directed or authorized by him. Moreover, a clear case must be shown."

To the same effect is *Mechem on Agency*, Vol. 2, *Second Ed.*, Sec. 2006, wherein it is stated:

"As a general rule he (the principal) cannot be held criminally liable for the act of his agent committed without his knowledge or consent."

The modern decisions in petty misdemeanor cases, and to some extent in the case of more serious crimes, reveal, however, two conflicting tendencies in respect of imposing vicarious criminal liability. The first is based upon strict principles of causation "as consecrated by centuries of practice". The second is based upon a transfer of the doctrine of *respondent superior* from the law of torts. Of this latter tendency Professor Sayre says, page 702:

"This second line of approach, by departing from ordinary principles of causation and from the fundamental, intensely personal, basis of criminal liability, violates the most deep-rooted traditions of criminal law. Vicarious liability is a conception repugnant to every instinct of the criminal jurist. It is not surprising, therefore, that courts today as a general rule reject the

second line of approach and make criminal liability exclusively dependent upon causation.

Such causation may be proved either by authorization, procurement, incitation or moral encouragement, or by knowledge plus acquiescence.

In the majority of tort cases in which the doctrine of *respondent superior* is invoked, the problem is primarily one of settling the incidence of the loss. In the criminal law the problem is vitally different. As Professor Sayre says, page 718, "No one yet has been able to explain exactly why one should be liable in tort for the unauthorized acts of one's servants." Various suggestions have been made, but of these it is said, "Whether the true basis be one or more of these, it seems clear that none will afford justification under modern conditions for criminal liability."

**(3) Application of the civil doctrine of *respondent superior* to a criminal case is particularly inappropriate when what the statute prohibits is wilful violation or when it requires a specific intent.**

The prohibition of the statute is solely against "any person who *wilfully* violates any provision of section 4 of this Act". (Italics ours.) A mere inadvertent or negligent offending is not punished. The criminal provisions of the Act were designed to punish the "most flagrant" violators (Senate Report No. 931, 74th Cong. 2nd Sess., Jan. 1, 1912), while other violations were reached by injunction, triple damage suits and licensing (Sec. 2, sub-divisions a, c and f).

As heretofore shown, neither the corporation nor any governing officer thereof had any knowledge of the alleged violations upon which the convictions were obtained, much less acquiesced therein. If there was no knowledge on the

part of any governing officer, it is clear that there could be no wilfulness properly imputable to the petitioner corporation. " \* \* \* Without the knowledge, the intent cannot exist." *U. S. v. Falcone*, 311 U. S. 205. Furthermore, "to establish the intent (to further, promote, and cooperate in an unlawful act), the evidence of knowledge must be clear, not equivocal." *Direct Sales Co. v. U. S.*, 319 U. S. 703, at page 711.

Very frequently legislatures in prohibiting certain conduct have prohibited it absolutely, without respect to whether or not it was engaged in "wilfully" or "knowingly". It is mainly in this type of case that a good many courts have held that a principal is criminally liable for the acts of his agent just as he would be under the doctrine of *respondent superior* in the tort cases. When, however, the statute prohibits conduct only when it has been "wilfully" or "knowingly" engaged in, the cases recognize that the wilfulness or knowledge of the agent may not be properly attributed to the corporate principal unless the agent is a governing officer of the corporation, which term may include such an official as a general manager or other representative wielding the whole executive power of the corporation.

The distinction between the two classes of statutes is well illustrated by *U. S. v. Burroughs*, 65 Fed. 2d, 796 (C. App. D. C., 1933). In this case defendants were indicted under a statute for failure to report sums of money expended for an election. The statute also provided for heavier penalties for wilful failure to report campaign contributions. The court held that in the former case no specific criminal intent need be proved, while in the latter case it was essential to prove it.

Unless the legislature clearly makes it appear that proof of criminal intent is to be dispensed with, such proof is to

be regarded as essential. *State v. Shedowsky*, 118 P.<sup>2d</sup> 280 (N. M., 1941).

The use of the word "wilfully" or the word "knowingly" in a statute is very frequently the characteristic which distinguishes a statute requiring the proof of specific intent from a statute which does not require such proof. Thus in *Hargrove v. U. S.*, 67 F. (2d) 820 (C. C. A. 8th, 1933), the court reversed a conviction for wilfully failing to make an income tax return and for wilfully and knowingly attempting to defeat and evade the payment of income tax, by reason of the error of the trial court in refusing to charge the jury that a specific intent was essential to the proof of the offenses.

In *Commonwealth v. Mirer*, 207 Mass. 141, 146 (1910), and in *Commonwealth v. Jackson*, 28 Atl. (2d) 894 (Pa., 1942), the contrast between prior statutes prohibiting wilful violations and later statutes omitting these words was pointed out.

Leading criminal cases in the state and federal courts, involving the element of wilfulness or specific intent, which have rejected the doctrine of *respondent superior*, are as follows: *U. S. v. Food & Grocery Bureau of Southern California*, 43 F. Supp. 966 (D. C. S. D. Cal., 1942), at page 971; *People v. Doble*, 265 Pac. 184 (Cal., 1928); *People v. Green*, 133 Pac. 334 (D. C. App. Cal., 1913); *U. S. v. Corlin*, 44 F. Supp. 940 (D. C. S. D. Cal., 1942); *State v. Woolsey*, 259 Pac. 826 (Mont., 1927); *Lorclace v. State*, 2 So. (2d) 796 (Miss., 1941); *People v. Canadian Fur Trappers' Corporation*, 248 N. Y. 159, 161 N. E. 455, wherein it was said at page 456: "the intent must be the intent of the corporation, not merely that of the agent"; *Grant Bros. Construction Co. v. U. S.*, 114 Pac. 956 (Ariz., 1911).

In New Jersey not even the failure of a statute to require proof of specific intent by the use of such words as "wil-

fully" or "knowingly" permits the charging of a principal with the commission of a crime unless he "aided, encouraged or connived at the perpetration of the crime done by the agent, or that the illicit act was habitually done in the course of the business." (Italics ours.) *State v. Pinto*, 29 Atl. 2d 180 (N. J., 1942). This we submit is the proper rule, both from a rational and historical point of view, which ought to be applied in all cases with the possible exception of petty misdemeanour cases involving light fines and no imprisonment.

- (4) The analogous punitive damage cases, in which the law is also thoroughly settled to the effect that the wilfulness of an inferior agent cannot be imputed to his corporate principal.

By its decision in *Lake Shore & Michigan Southern Ry. Co. v. Prentice*, 147 U. S. 101 (1893), this Court laid down the law clearly and unequivocally that a corporation not shown to have participated in the wilful act of its employee, *through its governing officers*, cannot be punished for his act even though such employee has acted within the scope of his employment. In that case, a conductor in charge of one of the trains of the defendant railway company had assaulted a passenger and falsely arrested him. The passenger sued the railway company for damages and recovered both compensatory and punitive damages for the illegal act of the conductor. This Court, reversing the judgment, held that the defendant railway company could be held liable for compensatory damages but not for punitive damages in view of the fact that it had not been shown that the railway company participated in the offense *through its governing officers*.

*Lake Shore* was a civil case, of course, but it is wholly plain that the decision prescribes exactly the same treatment

for a criminal case involving the element of wilfulness. Thus this Court said at page 107:

"Exemplary or *punitive damages*, being awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others, *can only be awarded against one who has participated in the offence.*" (Italics ours.)

And, further:

"In this court, the doctrine is well settled that in actions of tort the jury, in addition to the sum awarded by way of compensation for the plaintiff's injury, may award exemplary, punitive or vindictive damages, sometimes called smart money, if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or *criminal indifference* to civil obligations. But such *guilty intention* on the part of the defendant is required in order to charge him with exemplary or punitive damages. \* \* \* (Italics ours.)

The Court then pointed out how Mr. Justice Story, in the case of *The Amiable Nancy*, 3 Wheat. 546, speaking for this Court, held that the owners of an American privateer could not be punished through exemplary or vindictive damages for the act of the officers and crew of the privateer in illegally and wantonly seizing and plundering a neutral vessel and maltreating her officers and crew, without it being shown that such owners participated in the illegal acts.

This Court then points out (p. 108 of 147 U. S.) that the rule laid down in the case of *The Amiable Nancy* is not peculiar to courts of admiralty but is a common law rule to be applied in all cases in which the Federal jurisprudence must govern.

Discussing the libel and malicious prosecution cases, the Court says, referring to the principal, that "he is not liable to be punished by exemplary damages for *an intent in which he did not participate.*"

Referring to a New Jersey case, it says (p. 110) :

" \* \* \* the Supreme Court of New Jersey said of punitive damages: 'The right to award them rests primarily upon the single ground—wrongful motive.' 'It is the wrongful personal intention to injure that calls forth the penalty. *To this wrongful intent knowledge is an essential prerequisite.*' 'Absence of all proof bearing on the essential question, to wit, defendant's motive—cannot be permitted to take the place of evidence, without leading to a most dangerous extension of the doctrine *respondeat superior.*' 21 Vroom (50 N. J. Law) 484, 485. Whether a principal can be criminally prosecuted for a libel published by his agent without his participation is a question on which the authorities are not agreed; and where it has been held that he can, it is admitted to be an anomaly in the criminal law. *Commonwealth v. Morgan*, 107 Mass. 199, 203; *Regina v. Holbrook*, 3 Q.B.D. 60, 63, 64, 70, and 4 Q.B.D. 42, 51, 60."

Further discussing the applicable law, the Court said (pp. 114-5 of 147 U. S.):

"The law applicable to this case has been found nowhere better stated than Mr. Justice Brayton, afterwards Chief Justice of Rhode Island, in the earliest reported case of the kind, in which a passenger sued a railroad corporation for his wrongful expulsion from a train by the conductor, and recovered a verdict, *but excepted to an instruction to the jury that 'punitive or vindictive damages, or smart money, were not to be*



allowed as against the principal unless the principal participated in the wrongful act of the agent, expressly or impliedly, by his conduct authorizing it or approving it, either before or after it was committed.' This instruction was held to be right, for the following reasons: 'In cases where punitive or exemplary damages have been assessed, it has been done upon evidence of such wilfulness, recklessness or wickedness, on the part of the party at fault, as amounted to criminality, which for the good of society and warning to the individual ought to be punished. If in such cases, or in any case of a civil nature, such exemplary damages as will operate as punishment and teach the lesson of caution to prevent a repetition of criminality, yet we do not see how such damages can be allowed, where the principal is prosecuted for the tortious act of his servant, unless there is proof in the cause to implicate the principal and make him *particeps criminis* of his agent's act. No man should be punished for that of which he is not guilty.' 'Where the proof does not implicate the principal, and, however wicked the servant may have been, the principal neither expressly nor impliedly authorizes or ratifies the act, and the criminality of it is as much against him as against any other member of society, we think it is quite enough, that he shall be liable in compensatory damages, for the injury sustained in consequence of the wrongful act of a person acting as his servant.' *Hagan v. Providence & Worcester Railroad*, 3 Rhode Island, 88, 91." (Italics ours.)

This Court, in this well-reasoned opinion, thus laid down the following general principles:

- (1) That exemplary or punitive damages are imposed for the same reason that penalties of fine and imprison-

ment are provided for criminal offenses: to wit, to punish the offender and to deter others from committing a like offense.

(2) The rule that a principal is not liable either in punitive damages or for the criminal act of an agent, although committed within the scope of his authority, is applicable to corporations as well as to natural persons.

(3) That it is the element of wilfulness which alike determines the right of the individual to punitive damages and the right of the state to claim criminal penalties in statutes such as ours.

Applying these principles to the facts of the case it was deciding, this Court laid down the applicable rule when it said (at p. 114 of 147 U. S.):

"The president and general manager, or, in his absence, the vice-president in his place, actually wielding the whole executive power of the corporation, may well be treated as so far representing the corporation and identified with it, that any wanton, malicious or oppressive intent of his, in doing wrongful acts in behalf of the corporation to the injury of others, may be treated as the intent of the corporation itself. But the conductor of a train, or other subordinate agent or servant of a railroad corporation, occupies a very different position, and is no more identified with his principal, so as to affect the latter with his own unlawful and criminal intent, than any agent or servant standing in a corresponding relation to natural persons carrying on a manufactory, a mine, or a house of trade or commerce."

It then distinguished the case before it from *Denver & Rio Grande Ry. v. Harris*, 122 U. S. 597, 608, in which an armed force of several hundred men, organized and commanded by the vice-president and assistant general manager of the railway company, attacked with deadly weapons the agents and employees of another company, saying (at p. 114 of 147 U. S.):

" \* \* \* This court, speaking by Mr. Justice Harlan, quoted and approved the rules laid down in *Quigley's case*, and affirmed the judgment, not because any evil intent on the part of the agents of the defendant corporation could of itself make the corporation responsible for exemplary or punitive damages, but upon the single ground that the evidence clearly showed that the corporation, *by its governing officers*, participated in and directed all that was planned and done. 122 U. S. 610." (Italics curs.)

The Court therefore held that wilfulness could be imputed to a corporation only by reason of the knowledge or acts of "its governing officers".

The *Lake Shore* case has been consistently recognized as stating the Federal law ever since it was decided, and its doctrine has been regularly applied in admiralty as well as at common law. *The Amiable Nancy*, 3 Wheat. 546; *The Seven Brothers*, 170 Fed. 126 (D. C. R. I.); *Norfolk & P. Traction Co. v. Miller*, 174 Fed. 607 (C. C. A. 4th, 1909); *Pacific Packing & Navigation Co. v. Fielding*, 136 Fed. 577 (C. C. A. 9th). In *Bank of Palo Alto v. Pacific Postal Tel. Cable Co.*, 103 Fed. 811 (C. C. N. D. Cal., 1900), aff'd 109 Fed. 369 (C. C. A. 9th, 1901), the lower court stated, p. 847, that the rule "has been unvaryingly followed."

The rule has been specifically applied in the cases of a branch manager of an insurance company and of a division

superintendent of a telegraph company, whose wilfulness was held not to be imputable to the corporate employers. *Aetna Life Insurance Co. v. Brewer*, 12 F. (2d) 818 (Ct. App., D. C., 1926); *Memphis Telephone Co. v. Cumberland Telephone & Telegraph Co.*, 231 Fed. 835 (C. C. A. 6th, 1916), where in at pp. 840-2 a test of wielding the whole executive power of the corporation as distinguished from authority over a part only of its affairs is suggested.

### (5) The Cases Relied on by the Government.

The only case in this Court relied on by the Government is *New York Central Railroad Co. v. U. S.*, 212 U. S. 481, at pp. 492-6. This was an appeal from convictions under the Elkins Act for giving rebates upon shipments of sugar. The railroad company and its assistant traffic manager had been convicted. The evidence was clear that not only the assistant traffic manager but the general traffic manager had participated in the giving of the rebates (p. 490). The general manager of the New York Central and Fast Freight Lines of Buffalo, N. Y., had forwarded the cashier's draft for the rebates to the assistant traffic manager of the railroad company (p. 491). As noted by the Court, the principal attack here was upon the constitutional validity of the provisions of the Elkins Act which charged corporate common carriers with responsibility for the illegal acts of any of their officers, agents, representatives or employees acting within the scope of their respective employments (pp. 491-2).

This Court first addressed itself (p. 492) to the idea advanced by earlier writers on common law that a corporation could not commit a crime. It held that there is no more difficulty in imputing to a corporation a specific intent in criminal proceedings than in civil. It pointed out that the defendant had admitted at the trial that the gen-

cial freight manager and the assistant freight manager were persons authorized to fix the rates which were held to be illegal (p. 492). It further concluded that Congress had the power to charge the corporation, by express statutory provision, with the illegal acts of its authorized agents and officers in granting the rebates.

It is plain that this case is no authority whatsoever for the Government in our situation. The Price Control Act of 1942 does not attempt to impute to corporations the wilfulness or specific intent of its agents. In the *New York Central* case the propriety of such imputation by a court in the absence of specific statutory provision therefor was not even considered. Moreover, the superior agents of the railroad company whose acts were involved in that case were authorized by the corporation to do the very things which they did, to wit, to fix the rates to be charged for the shipping of sugar.

*Minnisohn v. U. S.*, 101 F. (2d) 477, 478 (C. C. A. 2nd 1939), held only that the guilty intent of officers of a corporation may be imputed to the corporation itself in order to prove the guilt of the corporation, and in that case the guilty individuals were the chief officers of the defendant corporation. We do not dispute this proposition, but it has no application to our case.

*Zito v. U. S.*, 64 F. (2d) 772, at p. 775 (C. C. A. 7th, 1933), involved convictions for conspiracy to violate the National Prohibition Act through the selling of corn sugar, a commodity peculiarly useful in the manufacture of intoxicating liquor. The evidence showed that there were few, if any, legitimate industries in and around the neighborhood in which the sales were made that required or could use the particular kind of corn sugar which the defendant corporation sold to appellant Zito and Capitol Products Co. Under the circumstances the Court evidently thought the evidence sufficient to fasten knowledge

of the sales made for illegal purposes by the agent of the corporation, upon the governing officers thereof.

The Government may also cite *U. S. v. Wilson*, 59 F. (2d) 97 (D. C. W. D., Wash., 1932). This was a case of the same type as the *Zito* case wherein a sales agent for Compressed Yeast Co., Inc. sold quantities of yeast for the illicit manufacture of alcohol and aided the buyer by advances of money and credit. The Court held that,

"Where the agent is employed to sell a compound containing qualities and substances designed or intended for use in the manufacture of alcoholic liquors, or is popularly known to contain such qualities and is used for the purpose, the principal must see that such compound is sold by the agent in harmony with, and not antagonistic to, or against, the sovereign will."

It concluded (p. 98),

"In the instant case the defendant had, no doubt, knowledge of the sale and the purpose for which used, or at least such as to put a reasonable person on inquiry."

In *Bowles v. Lee's Ice Cream* (Ct. of App., D. C., 1945), 148 F. 2d 113, large deliveries of beef were periodically received by a restaurant, without giving ration points, under such circumstances that knowledge and acquiescence on the part of its manager and practically sole stockholder seemed to the Court to be inescapable.

## (6) Conclusion.

The entire matter is well summed up by Professor Sayre, *ibid.*, at p. 702 and p. 719 where he says:

\* \* \* Vicarious liability is a conception repugnant to every instinct of the criminal jurist. \* \* \*

\* \* \* The rejection of *respondent superior* in the case of all crimes other than petty misdemeanors is therefore the result of a thoroughly sound instinct. \* \* \*

In the case at bar the facts are clear. It cannot possibly be contended that the conditioning of the sale of poultry upon the purchase of poultry parts (assumed *arguendo* to have been indulged in by inferior agents of petitioner corporation) was the natural and probable consequence of instructing them to sell poultry parts. It was a separate and distinct matter. Thus under the centuries-old doctrine of the criminal law, petitioner corporation is not criminally liable for their unauthorized acts.

Nor is there any evidence upon which to found knowledge and acquiescence, or even knowledge alone, on the part of any governing officer of petitioner corporation. As in the very recent case of *State v. Pinto*, 29 Atl. 2d, 180 N. J. 1942, in which the conviction was reversed, there was not even any evidence that "the illicit act was habitually done in the course of business," since all of the alleged sales took place during a three day period prior to Thanksgiving, 1943.

The sanctions provided for in the Price Control Act of 1942 are by no means restricted to criminal penalties. Congress, as previously pointed out, intended criminal prosecution to be restricted to "flagrant offenses" involving "willful" violations. For violations of another kind it provided for triple damage suits by injured persons and granted to the Price Administrator not only the privilege of applying for injunctions but the power to license and to revoke licenses.



There was, we submit, no excuse in this case for proceeding by criminal prosecution, in view of the fact that the aggregate amount charged for the poultry parts was less than \$200 and in view of the casualness of the sales. Having chosen to so proceed, however, the Government should, we submit, be required to conform to the time-honored standards of the criminal law, which run counter to the concept of vicarious liability for acts and accompanying state of mind unknown and unparticipated in. Congress expressly provided that in order for the criminal penalties to apply the violations would have to be "wilful". In the case of "wilful" violations of a flagrant nature, the heavy penalties of a year in jail and \$5000 fine for each offending may doubtless be considered appropriate. We submit, however, that before such penalties can be properly imposed, the sound standards of the criminal law must be met. It is very plain, we think, that in the case at bar they have not been met.

These considerations have particular force, it is submitted, when *the only governing officer of the corporation involved has been acquitted by the jury.* (Italics ours.)

### III

**It was reversible error for the trial court to deny, without exercising any discretion, the motion of defense counsel for permission to examine prior sworn statements shown to and read by witnesses upon the trial, and from which parts selected by the prosecutor were read to the jury.**

In its brief in opposition to the petition for certiorari, the Government admits (p. 8) "that the trial judge erred in stating that he had no discretion to permit examination of the statements". (Italics added.) Such admission is inescapable. In refusing defense counsel permission to examine the statements being shown to the witnesses, the trial court

said (R. 91), "I haven't been exercising any discretion. I would hold that the United States had an absolute legal right to insist on doing precisely what it has done. I will deny your application, which I understand is for permission to read what the witness has read." (Italics ours.) Defense counsel took an exception (R. 91).

In *U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 150, at pages 231-7, the question at issue is discussed at length. There were, however, circumstances in that case which led this Court to hold that the trial court, *in the exercise of its discretion*, did not commit reversible error in refusing defense counsel the right to examine grand jury testimony used to refresh the recollections of certain hostile witnesses called by the Government. There the court early in the trial adopted the practice of inspecting the transcript of the grand jury testimony in itself seeking to refresh the witnesses' recollections by reading from their prior testimony out of the hearing of the jury. *At no time was the transcript shown to the witness.* This Court held that the use of grand jury testimony for the purpose of refreshing the recollection of a witness rests in the sound discretion of the trial judge (p. 233), and that "*Normally, of course, the material so used must be shown to opposing counsel upon demand, if it is handed to the witness.*" (Italics ours.) The reasons it gave were "that only in that way can opposing counsel avoid the risks of imposition on and improper communication with the witness, and detect circumstances not appearing on the surface and expose all that detracts from the weight of testimony."

It was then pointed out that the first of these reasons was irrelevant in the particular case because the witnesses were employees of the defendant and hostile. As to the second reason it was pointed out that "no iron-clad rule requires that opposing counsel be shown the grand jury transcript where it is not shown the witness and where some appropri-

*ate procedure is adopted to prevent its improper use. That again is a matter which rests in the sound discretion of the court.*" (Italics ours.)

This Court therefore concluded that there was no abuse of discretion in view of the manner in which the trial judge supervised the procedure. It warned, however (p. 234),

"If the record showed that the refreshing material was deliberately used for purposes not material to the issues but to arouse the passions of the jurors, so that an objective appraisal of the evidence was unlikely, there would be reversible error. Likewise there would be error where under the pretext of refreshing a witness' recollection, the prior testimony was introduced as evidence."

It further pointed out that it clearly appeared (p. 235) that the use of the material was not prejudicial.

In our case the trial judge did not supervise in any way the use of the refreshing material. He permitted it to be shown to the witness, while at the same time refusing defense counsel the opportunity of examining it. He stated that he was not exercising any discretion in the matter and that the District Attorney had the *absolute legal right* to do what he was doing. Thus counsel was granted no opportunity to "detect circumstances not appearing on the surface" or to "expose all that detracts from the weight of testimony".

It was of the greatest importance to the petitioner corporation that the jury be not given the false impression that Max Kraus, its president, had personally participated in the transactions set forth in the Informations. He was the only "governing officer" of defendant corporation whose name was suggested in this connection. It was thus vital for the Government in order to convict the corporation to

connect him with some of these transactions. The fact that he was acquitted does not mean in the least that the jury may not have concluded (upon the basis of fragmentary impressions gleaned from questions and answers read from the statements shown to the witnesses and not upon the basis of the affirmative testimony given by them on the trial, which was to the contrary) that Max Kraus was involved. Obviously witnesses like these would be unlikely to distinguish carefully between M. Kraus & Bros., Inc., the corporation, its employees, and Max Kraus, the individual. It would be natural for them to refer to each as "Kraus". Without examining the context of the statements it is thus impossible to say what such a reference might mean. If the jury acted on such a basis, there would be error where under the pretext of refreshing a witness' recollection, the prior testimony was introduced as evidence".\* Similar considerations would apply to the attempt to get at least one of the witnesses to say on the basis of prior statements that contrary to their testimony given on the trial they had been compelled to buy the secondary poultry products.

This Court relied in the *Socony-Vacuum* case (p. 233) upon *Wigmore, Evidence*, (2d ed.), ser. 762. This author there states that the justice of the rule requiring the exhibition to opposing counsel of all refreshing material is clear and that there is no principle to support the small minority of contra decisions.

*Morris v. U. S.*, (C. C. A. 5th, 1906), relied upon by this Court (p. 233) in the same connection, and wherein the

\* That the jury very likely considered it as such appears from the fact that the judge who wrote the prevailing opinion for the Circuit Court of Appeals considered it as such, although the basis for his strictures based thereon (R. 275) was frail, since he excluded from consideration the distinct possibility, which cross examination might well have revealed, that the O.P.A. investigators did not correctly report the witnesses.

Court found reversible error in the refusal to permit examination of refreshing material, is a weaker case than ours. Nothing from the exhibited statements was read to the jury. As in our case, the statements themselves which were shown to the witnesses were not in the record, a bill of exceptions which reproduced none of the evidence being alone before the appellate court. In reversing the judgment the Circuit Court of Appeals said,

"To permit the district attorney to furnish a paper to a witness, and allow the witness to testify from and by that paper, without having previously exhibited it to the defendant on his demand, is practically to deny him the right of being confronted with the witnesses against him, and tends to deprive him of full opportunities to defend himself. We understand it to be the universal rule of evidence in the courts of this country that, where a witness is permitted to examine and refresh his recollection with a paper, it is to be tendered to the other side for inspection just as soon as it has been identified."

Reference was made by the Court to a decision by Judge Cooley in *Duncan v. Secley*, 34 Mich. 369, in which it was said,

"It would be a dangerous doctrine which would permit a witness to testify from secret memoranda in the way which was permitted here. The error was not cured in this case by the plaintiff offering on the next day, on the conclusion of his testimony, to produce the memorandum."

Nor can it be properly argued, as it is by the Government, that the admitted error was not prejudicial. It was clearly

prejudicial for the reasons stated, and, moreover, error is presumed to be prejudicial. *Merin v. Oliver*, 148 U. S. 664, and *Vicksburg, etc. R. Co. v. O'Brien*, 119 U. S. 99. In the last named case this Court held that it was well settled that a reversal would be directed unless it appeared beyond doubt that the error did not and could not have prejudiced the right of the party. It cited, among other cases, *Gilmer v. Higley*, 110 U. S. 47. This was a negligence action in which the error complained of was the refusal to permit certain questions on cross-examination. The appeal was upon a bill of exceptions only, there being no evidence in the record. It was held that the questions were proper and the Court said it was "unnecessary for the court to see injury to the defendant".

"We have not heard of such a rule in a revisory court. The farthest any court has gone has been to hold, that when such court can affirmatively see that the error worked no injury to the party appealing, it will be disregarded" (p. 50).

#### IV

The cumulative sentences, in the amount of \$2,500 each, totaling \$22,500, which were imposed upon nine counts of the two Informations upon which the petitioner corporation was found guilty, ought to be set aside in view of the fact that the prosecutor incorrectly told the jury that the maximum fine upon each count was \$1,000 and suggested that it was not customary to impose cumulative sentences.

On the pretext that defense counsel had told the jury that the individual defendant, if convicted, might receive cumulative jail sentences—which was true—the prosecutor,

in summing up, after telling the jury that this was none of its business, stated, "The maximum for each count in this court on this charge is one year in jail and \$1,000 fine— one year in jail and \$1,000 fine". He then went on to say that first offenders, second offenders, and even third offenders are never sentenced the maximum on each count (R. 233).

This statement to the jury, wholly erroneous in fact because the statute provides for a \$5,000 fine on each count, was not corrected by the court, and the jury took the case under the impression that it was correct. Doubtless it also believed that cumulative sentences would not be given. Nevertheless the court imposed cumulative sentences upon the nine counts upon which verdicts of guilty were found and in each case imposed a fine two and a half times that which the prosecutor had told the jury was the maximum.

It would seem to be too plain for argument that this was serious error which ought to call at the very least for reduction of the sentences, unless the failure of defense counsel to suggest a correction is fatal.

We respectfully suggest that that failure has nothing to do with the imposition of fines higher than \$1,000 per count, and that, therefore, it has no bearing upon whether or not a re-sentencing should take place. In its other aspect, that is in respect of the effect of the statement upon the jury in inducing conviction by reason of its belief that the sentence would probably not exceed a fine of \$1,000, it is necessary to say no more than that it has been frequently held that an appellate court will, in the exercise of sound discretion, notice error in the trial of a criminal case without there having been objection and exception, provided the error is sufficiently serious, which we believe this one to be. *Berger v. U. S.*, 295 U. S. 78; *New York Central R. R. Co. v. Johnson*, 279 U. S. 310, at pp. 318 and 319; *U. S. v. Atkinson*, 297 U. S. 157, at p. 160; *Crawford v. U. S.*, 212 U. S. 183, at p. 194; *Brasfield v. U. S.*, 272 U. S. 448, at p. 450.



## CONCLUSION

It is respectfully submitted that the convictions upon all counts should be reversed, and the Informations dismissed, in that (1) the Informations were insufficient in law, and the case as a whole was in consequence tried upon a completely erroneous theory, (2) relevant and material evidence offered by petitioner corporation and which went to the very heart of the case was excluded, (3) assuming *arguendo* the guilt of the inferior agents of petitioner corporation who handled the particular sales, neither their wilfulness or specific intent, nor their acts, can rightfully be imputed to petitioner corporation without at least knowledge thereof on the part of a governing officer, (4) the trial court committed reversible error in refusing to permit defense counsel to examine documents shown to certain of the Government's witnesses for the purpose *inter alia* of refreshing their recollections, and (5) it was improper for the trial court to permit the prosecutor, without correction, to grossly understate to the jury the amount of the fine which might be imposed under the statute upon petitioner corporation and thereafter to impose upon it fines largely in excess of the fine thus stated.

Respectfully submitted,

THOMAS TURNER COOKE,  
Attorney for Petitioner.

I. JONAS SPECINER  
and  
FRANK W. FORD,  
*Of Counsel.*

FILE COPY

DEC 13 1945  
CHARLES ELSON COPY

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1945

No. 198

**M. KRAUS & BROS., INC.,**

*Petitioner,*

*—against—*

**UNITED STATES OF AMERICA,**

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT

**REPLY BRIEF FOR PETITIONER**

**THOMAS TURNER COOKE,**  
*Attorney for Petitioner,*  
60 Broadway,  
New York 4, N. Y.

**L. JONAS SPECINER,**  
11 West 42nd Street,  
New York 17, N. Y.,

**FRANK W. FORD,**  
20 Exchange Place,  
New York 5, N. Y.,  
*Of Counsel.*

## TABLE OF CASES AND AUTHORITIES

	PAGE
C. I. T. Corp. v. U. S., 150 Fed. 2d 85 (C. C. A. 9th) . . . . .	4
Egan v. U. S., 137 Fed. 2d 369 (C. C. A. 8th), c. d. 320 U. S. 788 . . . . .	6
Emergency Price Control Act of 1912, Sec. 2h . . . . .	1
Lake Shore & Michigan Southern Ry. Co. v. Prentice, 147 U. S. 101 . . . . .	6
Mousel Bros. v. London & Northwest Ry., 2 K. B. (1917) 836 . . . . .	7
U. S. v. Armour & Co., 50 Fed. Supp. 347 . . . . .	5
U. S. v. Illinois Central R. Co., 303 U. S. 239 . . . . .	7

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1945

M. KRAUS & BROS., INC.,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

No. 198

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT

**REPLY BRIEF FOR PETITIONER**

1. The Government necessarily concedes (Bf., p. 27) that for petitioner corporation to have been guilty of the offenses charged in the Informations its conduct must have been evasive of the price ceilings for poultry, or that it must, at the least, have acted with evasive intent. The charge in each count is that petitioner corporation "unlawfully, wilfully and knowingly evaded the provisions of said Revised Maximum Price Regulation No. 269, Sec. 1429.5" by conditioning the sale of poultry upon the sale of poultry parts. The regulation thus alleged to have been violated is headed "Evasion". The acts specifically prohibited therein are not prohibited in, and of themselves, but only as methods of evasion. Certainly it is not intended to prohibit the charging of commissions or the making of charges for transportation or trade understandings. These are prohibited only as methods of evasion. Thus the *sine qua non* of the Govern-

ment's case is proof of evasion, or at least of intent to evade.\*

The basic difference between the position of the Government and that of the petitioner corporation lies in their respective ideas of what constitutes an evasion of ceiling prices for poultry. The Government contends that the mere conditioning of the sale of poultry at ceiling prices upon the sale of poultry parts constitutes an evasion of the price ceilings for poultry, without respect to whether or not the purchaser of the poultry parts gets his money's worth. The petitioner, on the other hand, contends that it is incumbent upon the Government to prove that the combination sale is inflationary in character in that the purchaser of the poultry parts does not get his money's worth, i.e., that the price charged for the poultry parts is an artificial one, indicating that the sale thereof along with the poultry is a device to hide an above-ceiling charge. The fundamental basis for petitioner's contention is that combination sales of plentiful commodities along with scarce commodities are anti-inflationary in that they increase the supply of goods being purchased by whatever purchasing power is outstanding.

If petitioner's theory is accepted, it is plain that the Informations are insufficient, and must be dismissed, because they contain no allegation that the prices charged for the poultry parts were excessive, or that the purchasers did not get their money's worth, and the case was tried throughout on the theory that it was unnecessary to make or prove such an allegation. It is most important to note, however, that the acceptance of the Government's theory as to what constitutes evasion or evidences evasive intent no less imperatively demands the reversal of the convictions. This for the reason, as shown in our main brief, that the petitioner was peremptorily barred by the trial court from rebutting

---

\* Under Sec. 2h of the Act established business practices such as combination sales cannot be interfered with except to prevent evasions.

the principal, if not the only, evidence relied upon by the Government to prove compulsion upon purchasers to buy poultry parts, i.e., the evidence that particular purchasers had gotten what appeared to be bad bargains due to their seeming inability to utilize the poultry parts.

The matter is very succinctly expressed in the dissenting opinion of Hincks, J., wherein it is said (R. 277): "The judge must have overlooked the tendency of such evidence to negative an inference that the sales were made with evasive intent. It was admissible on that fundamental issue, and its exclusion was erroneous." As pointed out in our main brief, the evidence which petitioner vainly and persistently sought to introduce was as to the public demand for poultry parts. It was flatly refused the right to introduce such evidence, and was peremptorily directed not to call any witness to testify on the subject matter, although counsel had stated that he had many such witnesses prepared to go on the stand (R. 162-4).

Such evidence was equally relevant and material, whichever theory of evasion, the Government's or petitioner's, is to be considered correct. If the Government's theory be correct, then the evidence is squarely relevant and of the highest importance upon the issue of whether or not the purchasers willingly acquired the poultry parts. Indeed, almost the whole of the Government's case, if not the whole thereof, in proof of compulsion, had been based upon the evidence of the purchasers, who were its witnesses, as to the lack of utility of the poultry parts. If it was open to the Government to prove that the purchasers got bad bargains in buying the poultry parts, it was certainly open to petitioner to attempt to prove by its own witnesses that the purchasers got their money's worth.\*

\* The idea advanced by the Government (Bl., p. 34) that petitioner was obligated to re-summon witnesses after the trial court had flatly refused to hear them, and they had been excused, simply because thereafter a slight amount of evidence was received bearing upon the subject-matter they had been called to testify upon, displays a complete lack of knowledge as to the conditions attending a jury trial in a large city.

On the other hand, if petitioner's theory be correct, it is equally plain that the proffered evidence was relevant and material upon the issue as to the excessiveness *vel non* of the price charged for the poultry parts.

How obvious it is that petitioner was barred from making its defense by the rulings of the trial court, even assuming the correctness of the Government's theory, clearly appears from parts of the trial court's charge to the jury. He specifically asked the jury to consider (R. 241) "whether the prices at which they (the poultry parts) had been sold, *were entirely out of line with any value that attaches to them, so that the prices charged, therefore would be almost entirely profit to defendants.*" \* \* \*. He told the jury that what the defendants "are charged with having done is imposing as a necessary condition of the purchase of turkeys the simultaneous purchase of chicken feet, skin or gizzards *that were utterly useless and valueless to the purchaser.*" (Italics ours.) If ever an issue was tried upon the evidence of one side and not upon the evidence of the other, this is it.

The theory now advanced by the Government to the effect that the benefit\* of making an additional sale raises the price charged for the poultry above the ceiling price, without respect to whether or not an excessive price was charged in the additional sale, was not at all the theory upon which the case was tried. As pointed out by the Government (Bf., p. 32), the trial court ruled, "The only thing we are concerned with is whether or not the witnesses who testified purchased chicken feet to meet a demand in their stores" (R. 162). That, says the Government, "was the trial judge's theory of the case" (Bf., p. 32). On that issue a great deal of evidence was received from the Government as to the worthlessness of the poultry parts. This theory excluded

\* Plainly this so-called benefit cannot be measured in dollars and cents. Indeed, as may easily happen, when the additional goods are sold at a loss, it becomes a detriment.



the possibility of petitioner's rebutting by its own witnesses the prosecution's evidence as to lack of demand for poultry parts, and thereby deprived petitioner of the right to put in a defense. Thus the Government's present theory is purely academic as far as the trial of the case is concerned. Value of the poultry parts was a vital issue therein whether or not it ought to have been.

Little more need be said concerning the Government's argument on the first point. The District Court cases and the Municipal Court case which it cites (Bf., p. 29) are certainly not impressive authorities, to say the least. No Circuit Court of Appeals decision is cited. Only one of the lower court cases was even a criminal case, and in that (the *Armour* case) the decision was not after trial, but upon demurrer. In all of the cases, unlike ours, "tying agreements" were specifically prohibited in the regulation. They would seem to require no further discussion.

The Government also relies upon an alleged administrative interpretation of the meaning of the prohibition against "tying agreements" which are not specifically prohibited or even mentioned in our regulation. This obviously lacks significance since the question in our case is whether petitioner was guilty of evasive conduct or conduct with evasive intent, not whether its conduct comes within the definition of tying agreement. Certainly, in view of the complete lack of reference to "tying agreements" in the poultry regulation, petitioner could not have been expected to resort to the protest and review provisions of the Act in order to attack the propriety of an interpretation which on its face had no bearing on the particular regulation.

2. As pointed out in the majority opinion of the Circuit Court of Appeals (R. 272), the defendants relied in that court upon "failure of evidence to establish guilt". It is upon this ground, and not, as suggested by the Government

(Bf., p. 36), upon the erroneousess of an instruction to the jury that petitioner presses the argument here that a corporation cannot be convicted of wilfully violating the law when no knowledge and acquiescence or participation of any governing officer is shown.

In answering our basic argument, the Government suggests that the rule to be applied to corporate responsibility is different from that to be applied to the responsibility of natural persons for the acts of their agents, but does not suggest wherein it is different. In applying the strictly analogous rule forbidding the imputation to a principal, for the purpose of assessing punitive damages, of the wilfulness of an agent, this Court has, however, held directly to the contrary. *Lake Shore & Michigan Southern Ry. Co. v. Prentice*, 147 U. S. 101, at pages 109-111. When it is conceded, as we concede, that the participation of a governing officer may be charged to the corporation, it is plain that there is no reason whatsoever for distinguishing between corporate principals and natural principals, merely because of the fact that a corporation can act only through agents.

The Government's principal argument, however, is that the wilfulness required to be proved in the case at bar is nothing more than the intentional doing of an act, as distinguished from the doing of an act with evil purpose or criminal motive. This may or may not be true, but assuming *arguendo* that it is true, our argument is not in the least affected, for it is exactly as difficult to impute intentional action to a corporation by reason of the acts of its inferior agents, servants or employees, as it is to impute evil purpose or criminal intent, once it is admitted, as it now must be, that a corporation can be guilty of a crime involving evil purpose or criminal intent.

We have commented in our main brief on nearly all of the cases cited by the Government. Since *Egan v. U. S.*, 137 Fed. 2d 369 (C. C. A. 8th), certiorari denied, 320 U. S. 788, involved acts of the president of the company, aided and

abetted by other directors, vice presidents and important officers, it is an authority which is not in the least in conflict with our position. In *C. I. T. Corp. v. U. S.*, 150 F. 2d 85 (C. C. A. 9th), the court noted (p. 90) that the local manager, "pressed by his seniors to procure the (financial) statements", was "the primary agent of the corporation having the duty to determine whether financial statements of applicants for F.H.A. loans, which were to be passed on to the Administrator", were true or false. The *Illinois Central* and *Mousel* cases (Bf., pp. 42, 39) are cases in which the respective statutes imposed penalties for defaults in positive duties. They are clearly not in point.

As pointed out in our main brief, it is immaterial whether or not Nathan Lotto, so-called branch manager, participated in any of the allegedly conditioned sales. The Government attempts, nevertheless, to connect him with the Braverman sales. Braverman, however, had no difficulty in selling all of the chicken feet he bought (R. 88), and there is no other evidence that the sale to him of the poultry was conditioned upon the purchase of poultry parts. As for the remainder of the evidence relied upon to connect "responsible corporate officials" with the allegedly conditioned sales (Bf., pp. 41-42, foot-note 15) it is plainly entirely consistent with innocence, unless the mere fact that more than one salesman allegedly participated in what were on their face entirely legitimate sales is to condemn a corporation whose only governing officer charged with participation therein has been acquitted.

**CONCLUSION**

For the reasons stated it is respectfully submitted that the convictions should be reversed.

THOMAS TURNER COOKE,  
*Attorney for Petitioner,*  
60 Broadway,  
New York 4, N. Y.

I. JONAS SPECINER  
and  
FRANK W. FORD,  
*Of Counsel.*

No. 198

---

**In the Supreme Court of the United States**

OCTOBER TERM, 1945

---

**M. KRAUS & BROS., INC., PETITIONER**

**v.**

**UNITED STATES OF AMERICA**

---

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND  
CIRCUIT**

---

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

---

# I N D E X

	Page
Opinion below.....	1
Jurisdiction.....	1
Questions presented.....	2
Statute and regulation involved.....	2
Statement.....	4
Argument.....	5
Conclusion.....	10

## CITATIONS

### Cases:

<i>Boutles v. Cudahy Packing Co.</i> , 58 F. Supp. 745.....	6
<i>Boutles v. Lee's Ice Cream Co.</i> , 148 F. 2d 113.....	8
<i>Brown v. Banana Distributors</i> , 52 F. Supp. 804.....	6
<i>Goldman v. United States</i> , 316 U. S. 129.....	8
<i>Minnisohn v. United States</i> , 101 F. 2d 477.....	8
<i>New York Central Railroad v. United States</i> , 212 U. S. 481.....	8
<i>United States v. Armour &amp; Co. of Delaware</i> , 50 F. Supp. 347.....	6
<i>United States v. Socony Vacuum Oil Co.</i> , 310 U. S. 150.....	8
<i>Zito v. United States</i> , 64 F. 2d 772.....	8

### Statutes and Regulations:

Emergency Price Control Act of 1942, 56 Stat. 23, as amended, 50 U. S. C. App., Supp. IV, 901 et seq.:	
Sec. 2 (a).....	3
Sec. 4 (a).....	3
Sec. 205 (b).....	3
Revised Maximum Price Regulation No. 269, issued December 18, 1942 (7 Fed. Reg. 10708), and reissued with amendments on October 8, 1943 (8 Fed. Reg. 13813):	
Sec. 1429.5.....	3

# In the Supreme Court of the United States

OCTOBER TERM, 1945

---

No. 198

M. KRAUS & BROS., INC., PETITIONER

v.

UNITED STATES OF AMERICA

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND  
CIRCUIT

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

---

## OPINION BELOW

The majority and dissenting opinions in the circuit court of appeals (R. 326-332)<sup>1</sup> have not yet been reported.

## JURISDICTION

The judgment of the circuit court of appeals was entered May 31, 1945 (R. 333). The petition for a writ of certiorari was filed July 5, 1945. The jurisdiction of this Court is invoked under

---

<sup>1</sup> The dissenting opinion was predicated solely upon the exclusion of testimony, which is considered at pp. 6-7, *infra*.



Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

#### QUESTIONS PRESENTED

1. Whether a device, whereby poultry is sold only in combination with undesired chicken feet, skin or gizzards, is an evasion of established maximum prices.

2. Whether the corporation which received the proceeds of such combination sales was criminally liable for the acts of its employees in making the sales.

3. Whether the trial court's refusal to permit defense counsel to examine affidavits used by the Government to impeach its own witnesses constituted reversible error, where such prior statements were used only in an attempt to establish the personal participation of petitioner's president, who was acquitted.

4. Whether the Government counsel's erroneous statement in his summation in respect of the maximum fine which could be imposed constituted reversible error.

#### STATUTE AND REGULATION INVOLVED

The Emergency Price Control Act of 1942, 56 Stat. 23, as amended, 50 U. S. C. App., Supp. IV, 901 *et seq.*, provided in pertinent part:

SEC. 2. (a) Whenever in the judgment of the Price Administrator \* \* \* the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and effectuate the purposes of this Act.

SEC. 4. (a) It shall be unlawful \* \* \* for any person to sell or deliver any commodity, \* \* \* in violation of any regulation or order under section 2 \* \* \*.

SEC. 205. (b) Any person who willfully violates any provision of section 4 of this Act \* \* \* shall, upon conviction thereof, be subject to a fine of not more than \$5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment. \* \* \*

Revised Maximum Price Regulation No. 269, issued December 18, 1942 (7 Fed. Reg. 10708), and reissued with amendments on October 8, 1943 (8 Fed. Reg. 13813), provides in pertinent part:

SEC. 1429.5. *Evasion*.—Price limitations set forth in this Revised Maximum Price Regulation No. 269 shall not be evaded whether by direct or indirect methods, in connection with any offer, solicitation, agreement, sale, delivery, purchase or receipt of, or relating to, the commodities

prices of which are herein regulated, alone or in conjunction with any other commodity, or by way of commission, service, transportation, or other charge, or discount, premium, or other privilege or other trade understanding or otherwise.

#### STATEMENT

Two informations, each in six counts, were returned against petitioner in the United States District Court for the Southern District of New York.<sup>2</sup> Each count charged a willful violation of the Emergency Price Control Act of 1942 and Maximum Price Regulation No. 269, Section 1429.5, in that, as an integral part of the sale of a specified amount of poultry, on a specified date in November 1943, petitioner demanded, compelled, and required the buyer to purchase an additional commodity, variously described as chicken feet, chicken skin, or gizzards, at a specified price, as a condition of the sale of the poultry. (R. 3-13.) The two informations were consolidated for trial (R. 14). Count 5 of the first information was dismissed at the close of the Government's case (R. 185), and petitioner was acquitted on counts 1 and 2 of the second information (R. 286). It was convicted on the other counts and fined \$2,500 on each, or a total of \$22,500 (R. 286, 290).

<sup>2</sup> Petitioner's president was named as a codefendant in one information, but he was acquitted (R. 3-7, 286).

On appeal, the judgment was affirmed, one judge dissenting (R. 332, 333).

The evidence for the Government consisted of the testimony of the retail butchers named in the various counts of the information that in the period from November 22 to 24, 1943, immediately prior to Thanksgiving, they called for poultry at petitioner's wholesale establishment, and that boxes of chicken feet, skin, and gizzards, which they had not ordered, were loaded on their trucks (R. 70, 83, 85, 90, 102-103, 129-130).<sup>3</sup> The purchasers were billed for the poultry at ceiling prices and separately for the feet, skin, etc. (R. 71-72, 82-83, 90, 132, 165-166). All except one hostile witness (see R. 103-106) testified that they had little or no demand for the feet, gizzards, etc. (R. 68, 83, 86-88, 126, 169, 175) and that the greater part of these items so purchased was given or thrown away (R. 72, 84, 93, 132, 179).

#### ARGUMENT

1. Petitioner contends (Pet. 2-3, 9, 10-11) that the evidence did not establish an evasion of the maximum price regulation for the reason that a combination or "tie-in" sale, whereby a scarce commodity is sold only in conjunction with a

<sup>3</sup> Testimony of one witness disclosed a slight variation in that he stated he was asked on two occasions whether he could use chicken skin or feet and he replied that he would take some (R. 168, 174). But this witness further testified that he had never bought chicken feet or skin before (R. 169, 175).

slower moving product, is not illegal if the secondary product is sold at a fair price. Similarly, it contends that it was reversible error for the trial judge to limit the testimony offered by petitioner as to the existence of a market for chicken feet, skin, etc.

It is obvious, however, that a dealer who must purchase a secondary product for which he himself has no demand, in order to get a scarce product he desires, is, in fact, paying more than ceiling prices for the scarce commodity, whether or not the secondary commodity can be sold by some other person supplying a different type of trade, and, however fair the price. The combination sale is thus, in fact, an evasion of established maximum prices. See *United States v. Armour & Co. of Delaware*, 50 F. Supp. 347, 349 (D. Mass.); *Bowles v. Cudahy Packing Co.*, 58 F. Supp. 748 (W. D. Pa.), where "tie-in" sales of eggs (clearly a marketable commodity) with butter were held to be violations of maximum price regulations. See also *Brown v. Banana Distributors*, 52 F. Supp. 804, 805 (D. Conn.).

Hence, we submit that the trial judge would have committed no error had he adhered to his original ruling excluding testimony offered by petitioner "to show that there is and has been a demand for chicken skins, chicken feet, gizzards \* \* \* that they are dealt and traded in" (R. 189), on the ground that "the only thing we are concerned with is whether or not the witnesses

who testified purchased chicken feet to meet a demand in their stores" (R. 190). In fact, however, the judge did not wholly exclude such evidence. When petitioner's president took the stand in his own behalf he was cross-examined as to the existence of a market for chicken skins, etc. (R. 213-217), and thereafter the witness whose testimony had previously been excluded (R. 188-190) was recalled and allowed to testify that there was a retail market for chicken feet (R. 226-228). Petitioner made no further attempt to call any other witnesses to testify on this subject, although there was an over-night adjournment after this witness was allowed to testify and before the close of defendants' case (R. 15, 250). According to the statement of petitioner's counsel at the time the evidence was first offered, the testimony of the additional witnesses whom he had originally intended to call would have been merely cumulative (R. 190-191). There is thus no foundation for any claim that reversible error resulted from the exclusion of evidence, as contended by petitioner and held by the dissenting judge (R. 332).

2. The contention (Pet. 3, 9, 11-12) that petitioner should not have been held liable for the acts of its employees is untenable. Petitioner's president admitted on the stand that the employees selling the secondary products were acting on behalf of the corporation and that the corporation received the proceeds of such sales (R. 212-213, 217-218, 220-221). Corporate responsibility is

therefore clear. *New York Central Railroad v. United States*, 212 U. S. 481, 492-496; *Bowles v. Lee's Ice Cream Co.*, 158 F. 2d 113 (App. D. C.); *Minnisohn v. United States*, 101 F. 2d 477-478 (C. C. A. 3); *Zito v. United States*, 64 F. 2d 772, 775 (C. C. A. 7).

3. Two witnesses for the Government were asked about their dealings with Max Kraus, president of petitioner, who had been named as a defendant in one of the informations (R. 3-7), and both denied any transactions with Kraus personally (R. 105, 132). The witnesses were then shown signed statements given by them to O. P. A. investigators, and were questioned further about their conversations with Kraus, but both persisted in their denials that Kraus had participated in the sales of chicken feet, etc., to them (R. 105-112, 132-141, 153-158, 160-162). Kraus was acquitted by the jury (R. 286). When the statement was shown to the first witness by government counsel, petitioner's attorney requested leave to examine it. The trial judge denied such permission, stating, "I haven't been exercising any discretion. I would hold that the United States had an absolute legal right to insist on doing precisely what it has done." (R. 107.)

We agree with petitioner (Pet. 12) and with the court below (R. 328-330) that the trial judge erred in stating that he had no discretion to permit examination of the statements. See *Goldman v. United States*, 316 U. S. 129, 132; *United States*



v. *Socony Vacuum Oil Co.*, 310 U. S. 150, 231-237.

In the present posture of the case, however, the error, if any, was immaterial. The statements were used solely in an attempt to establish Kraus's personal complicity, and his acquittal renders the question academic. Furthermore, even if the trial judge's action might have affected petitioner, it could not have been prejudicial, for, as the circuit court of appeals indicated (R. 330-331), the witnesses' testimony, which contradicted their pre-trial statements concerning their dealings with Kraus personally, was favorable to him and, hence, to petitioner.

4. In his closing argument, government counsel stated that he thought the defense had resorted to a shabby trick in referring to the possibility of a five-year prison sentence when there was no likelihood that any such sentence would be imposed. He stated, "That is none of your business, none of mine, that is, the jail sentence involved. \* \* \*

The maximum for each count in this court on this charge is one year in jail and a \$1,000 fine \* \* \*." (R. 270.) The maximum fine is, in fact, \$5,000 (*supra*, p. 3).

Petitioner argues (Pet. 4, 10, 13) that this mistake on the part of the Government's counsel constituted reversible error. There is no merit in this contention. At the very opening of his charge to the jury the trial judge told them: "You will make up your minds solely and wholly on what you find the testimony to be. You are not to consider the

penalty or the possible penalty in this case. Both lawyers, in my opinion, should not have told you about it." (R. 273.) Furthermore, it is clear from the reference to imprisonment that the discussion of penalties related to the individual codefendant who was actually acquitted by the jury.

#### CONCLUSION

The decision below is correct. The case presents no conflict of decisions or questions of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

HAROLD JUDSON,  
*Acting Solicitor General.*

ALD THERON L. CAUDLE,  
*Assistant Attorney General.*

✓ ROBERT S. ERDAHL,  
BEATRICE ROSENBERG,  
*Attorneys.*

AUGUST 1945.

FILE COPY

DEC 11 1945

CHARLES ELMORE GOSPEY  
101 E. 20th

No. 198

---

**In the Supreme Court of the United States**

OCTOBER TERM, 1945

---

M. KRAUS & BROS., INC., PETITIONER

UNITED STATES OF AMERICA

---

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT

---

BRIEF FOR THE UNITED STATES

---

# INDEX

	Page
Opinion below .....	1
Jurisdiction .....	1
Questions presented .....	2
Statute and regulation involved .....	2
Statement .....	5
Summary of argument .....	17
Argument:	
I. A seller who compels a purchaser to buy another commodity in order to secure a product selling at the ceiling price is guilty of an evasion of the prescribed maximum price for the desired commodity, irrespective of whether the secondary commodity is sold at not more than the ceiling price or at a fair price if no maximum price has been established. Hence, evidence that only a fair price was charged for the secondary product is irrelevant .....	21
II. Since the compelled sales were effected by persons acting on behalf of the corporation for the benefit of the corporation and within the scope of their authority, the corporation is criminally liable for such sales .....	35
III. The acquittal of petitioner's president renders academic the question whether it was reversible error for the trial judge to refuse defense counsel an opportunity to examine statements shown to Government witnesses in an effort to refresh their recollection as to their transactions with the president .....	43
IV. The prosecutor's incorrect statement of the maximum penalty applicable to the offenses charged was cured by the court's direction to the jury to disregard possible penalties .....	50
Conclusion .....	52

## CITATIONS

### Cases:

<i>American Socialist Soc. v. United States</i> , 266 Fed. 212, certiorari denied, 254 U. S. 637 .....	41
<i>Bowles v. Coffin-Redington Co.</i> , O. P. A. Desk Book, 3 Opinions and Decisions 2072 .....	29
<i>Bowles v. Cudahy Packing Co.</i> , 58 F. Supp. 748 .....	29
<i>Bowles v. Inland Trading Co.</i> , O. P. A. Desk Book, 2 Opinions and Decisions 2223 .....	29
<i>Bowles v. Seminole Rock &amp; Sand Co.</i> , No. 914 O. T. 1944, decided June 4, 1945 .....	29
<i>Bowles v. Stafford</i> , 1 Price Control Cases (C. C. H.) p. 51692 .....	29
<i>Browder v. United States</i> , 312 U. S. 335 .....	40, 41
<i>Brown v. Banana Distributors</i> , 52 F. Supp. 804 .....	27, 29

## II

### Cases—Continued

	Page
<i>C. I. T. Corp. v. United States</i> , 150 F. 2d 85.....	38, 39
<i>Dunlop v. United States</i> , 165 U. S. 486.....	52
<i>Edelmann v. Bonded Liquors, Inc.</i> , O. P. A. Desk Book, 2 Opinions and Decisions 2211.....	27, 29, 30
<i>Egan v. United States</i> , 137 F. 2d 369, certiorari denied, 320 U. S. 788.....	38
<i>Hartzel v. United States</i> , 322 U. S. 680.....	41
<i>Hines v. United States</i> , 131 F. 2d 971.....	51
<i>Joplin Mercantile Co. v. United States</i> , 213 Fed. 926, affirmed, 236 U. S. 531.....	38
<i>Lake Shore etc. Railway Co. v. Prentice</i> , 147 U. S. 101.....	36, 37
<i>Landay v. United States</i> , 108 F. 2d 698, certiorari denied, 309 U. S. 681.....	51, 52
<i>Minnisohn v. United States</i> , 101 F. 2d 477.....	38
<i>Moore v. United States</i> , 132 F. 2d 47, certiorari denied, 318 U. S. 784.....	52
<i>Mousell Bros. v. London and Northwestern Railway Co.</i> , 2 K. B. (1917) 836.....	40
<i>New York Central Railroad v. United States</i> , 212 U. S. 481.....	37, 38
<i>Sawyer v. United States</i> , 202 U. S. 150.....	51
<i>Screws v. United States</i> , 325 U. S. 91.....	41
<i>Spies v. United States</i> , 317 U. S. 492.....	41
<i>Suhay v. United States</i> , 95 F. 2d 890, certiorari denied, 304 U. S. 580.....	51
<i>United States v. Armour &amp; Co.</i> , 50 F. Supp. 347.....	29, 31
<i>United States v. General Motors Corporation</i> , 121 F. 2d 376, certiorari denied, 314 U. S. 618.....	42
<i>United States v. Illinois Central R. Co.</i> , 303 U. S. 239.....	42
<i>United States v. Socony Vacuum Oil Co.</i> , 310 U. S. 150.....	48, 51
<i>Zimberg v. United States</i> , 142 F. 2d 132, certiorari denied, 323 U. S. 712.....	40
<i>Zito v. United States</i> , 64 F. 2d 772.....	39

### Statutes and Regulations:

Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, as amended, 50 U. S. C. App., Supp. IV, 901 et seq.:	
Sec. 1.....	2, 29, 30
Sec. 2 (a).....	3
Sec. 4 (a).....	4
Sec. 205 (b).....	4
Sec. 302 (b).....	24
Revised Maximum Price Regulation No. 269, issued De- cember 18, 1942 (7 Fed. Reg. 10708), and reissued with amendments on October 8, 1943 (8 Fed. Reg. 13813):	
Sec. 1429.5.....	4, 21, 26
Revised Maximum Price Regulation No. 269, revised effective January 1, 1945, sec. 1.3 (d), 9 Fed. Reg. 15095..	26

Miscellaneous:

	Page
Edgerton, <i>Corporate Criminal Responsibility</i> , 12 Yale L. J. 827.....	37
Mechem, <i>Agency</i> , Vol. 2, 2d ed., sec. 2008 at p. 1579 n. 75.....	39
O. P. A. Service, Vol. 1, p. 2: 812.....	27
Sayre, <i>Criminal Responsibility for Acts of Another</i> , 43 Harv. L. Rev. 689 at p. 721.....	39
Wigmore on <i>Evidence</i> , 3d ed., sec. 762.....	48

# In the Supreme Court of the United States

OCTOBER TERM, 1945

---

No. 198

M. KRAUS & BROS., INC., PETITIONER

v.

UNITED STATES OF AMERICA

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

BRIEF FOR THE UNITED STATES

---

## OPINION BELOW

The majority and dissenting opinions in the circuit court of appeals (R. 271-277) are reported at 149 F. 2d 773.

## JURISDICTION

The judgment of the circuit court of appeals was entered May 31, 1945 (R. 278). The petition for writ of certiorari was filed July 5, 1945, and was granted October 8, 1945 (R. 279). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.



### QUESTIONS PRESENTED

1. Whether a seller's act in compelling purchasers to buy chicken feet and chicken skin as a necessary condition to the sale of poultry to them at ceiling prices constitutes an evasion of maximum prices for poultry established by the maximum price regulation, irrespective of the fairness of the price charged for the feet and skin.

2. Whether the corporation which received the proceeds of such combination sales was criminally liable for the acts of its employees in making the sales.

3. Whether the trial court's refusal to permit defense counsel to examine statements used by the Government to refresh the recollection of its own witnesses constituted reversible error, where such <sup>prior</sup> ~~price~~ statements were used only in an attempt to establish the personal participation of petitioner's president, who was acquitted.

4. Whether Government counsel's erroneous statement in his summation in respect of the maximum fine which could be imposed constituted reversible error where the trial judge specifically instructed the jury that they were not to consider the penalty in reaching a verdict.

### STATUTE AND REGULATION INVOLVED

The Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, as amended, 50 U. S. C. App., Supp. IV, 901 *et seq.*, provides in pertinent part:

SEC. 1. (a) It is hereby declared to be in the interest of the national defense and se-

curity and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes. \* \* \*

SEC. 2: (a) Whenever in the judgment of the Price Administrator \* \* \* the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with

the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and effectuate the purposes of this Act.

SEC. 4. (a) It shall be unlawful \* \* \* for any person to sell or deliver any commodity, \* \* \* in violation of any regulation or order under section 2 \* \* \*.

SEC. 205. (b) Any person who willfully violates any provision of section 4 of this Act \* \* \* shall, upon conviction thereof, be subject to a fine of not more than \$5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) [relating to the disclosure or use for personal benefit of official information by government officers] and for not more than one year in all other cases, or to both such fine and imprisonment.

Revised Maximum Price Regulation No. 269, —issued December 18, 1942 (7 Fed. Reg. 10708), and reissued with amendments on October 8, 1943 (8 Fed. Reg. 13813), fixing maximum prices for poultry, provides in pertinent part:

SEC. 1429.5 *Evasion.* Price limitations set forth in this Revised Maximum Price Regulation No. 269 shall not be evaded whether by direct or indirect methods, in connection with any offer, solicitation, agreement, sale, delivery, purchase or receipt of, or relating to, the commodities prices of which are herein regulated,

alone or in conjunction with any other commodity, or by way of commission, service, transportation, or other charge, or discount, premium, or other privilege or other trade understanding or otherwise.

#### STATEMENT

Two informations, each in 6 counts, were returned against petitioner in the United States District Court for the Southern District of New York.<sup>1</sup> Each count upon which petitioner was convicted charged a wilful violation of the Emergency Price Control Act of 1942 and Maximum Price Regulation No. 269, Section 1429.5; it was alleged that, as an integral part of the sale of a specified amount of poultry, on a specified day in November, 1943, just prior to Thanksgiving,<sup>2</sup> petitioner demanded, compelled and required the buyer to purchase chicken feet or chicken skin, at a specified price, as a condition of the sale of the poultry (R. 2-9). The two informations were consolidated for trial (R. 10). Count 5 of the first information was dismissed at the close of the Government's case (R. 159) and petitioner was acquitted on counts 1<sup>3</sup> and 2 of the second information (R. 245). It was convicted on the

<sup>1</sup> We designate Information No. C117-64 (R. 2-5) as Inf. I, and the other Information, C117-65 (R. 6-9), as Inf. II. Petitioner's president, Max Kraus, was named as co-defendant in Inf. I, but was acquitted on the five counts submitted to the jury (R. 245).

<sup>2</sup> Thanksgiving in 1943 was on November 25.

<sup>3</sup> The acquittal on this count removes chicken gizzards from the case.

other counts and fined \$2,500 on each, or a total of \$22,500 (R. 245, 247-248). On appeal the judgment was affirmed, one judge dissenting as to the exclusion of evidence (R. 271-278).

Petitioner corporation has been engaged in the wholesale meat and poultry business in New York City for 20 years (R. 165) and has 35 employees (Pet. Br. 8). While it ordinarily did a gross business of seven or seven-and-a-half million dollars a year, its gross business during 1943 was not quite four million dollars (R. 178). The principal officers of the corporation are Max Kraus, president, his son, vice-president, and his brother, secretary and treasurer (R. 165, 177). There was a manager of the poultry department (Nathan Lotto) and also a manager of the meat department (William Harriss); there was a man in charge of each of the separate divisions of the meat department, lamb, beef, etc. However, these men were used in the poultry department in the holiday seasons. (R. 165-166, 182, 197.) The president of the corporation testified that most of his time was spent in the administrative office, which was not on the selling floor, and that he did not do any selling, but he conceded that he was at the office every day and would "go through the plant to see and ask the salesmen what they received, how things are moving and how things are selling" (R. 166-167, 170); that he did some buying and "importing" (R. 166, 179); that there

would be meetings with the employees at which "we go over matters, what is coming, what is selling, talk about customers"; that he kept his "fingers right on all conditions" (R. 178-179; see also R. 205); and that he gave the salesmen "certain authorities that they can buy and that they can sell" (R. 180).

While the salesmen were, according to the president, not instructed to push chicken feet or chicken skin and were paid salaries and not commissions, they were there for the purpose of selling whatever the corporation got and "if they wouldn't be a proper salesman I wouldn't have them there." (R. 177, 187-188.) The manager of the poultry department conferred with the president daily (R. 204). In November, 1943, the corporation had but "a small shipment in one car of chicken skin" but had "quite some feet on hand" (R. 189). The skin was all disposed of during the Thanksgiving season in 1943 and there were only about 4 or 5 barrels of feet left (R. 190, 215). Much of the chicken feet was "processed" by the corporation itself and was a "left over product" from its previous evisceration of chickens (R. 169, 182), but it was not denied by the president that some of the chicken feet may have been bought by the corporation at 3 cents a pound (R. 179-180). The president thought that the corporation paid for the chicken skins  $23\frac{1}{2}$  or  $24\frac{1}{2}$  cents a pound (R. 181).

While the corporation ordinarily received between 100 and 150 cars of turkeys between Thanksgiving and New Year, it received only one car of turkeys (thirty or forty thousand pounds) for Thanksgiving, 1943 (R. 202). The corporation had orders for more turkeys than it received and the president and the manager of the poultry department agreed that the turkeys should be rationed among the steady customers according to a list which was prepared (R. 202-203, 209-212). Customers who asked as to the prospects of obtaining turkeys were advised that the supply would be small but that the corporation would do the best for them it could (R. 213-214).

There was no dispute that the turkeys and chickens involved in the counts upon which petitioner was convicted were billed at ceiling prices fixed by the Office of Price Administration, as testified to by an official of that Administration (R. 155-156); there had been no ceiling price fixed for chicken feet or chicken skin.

The testimony of the retail dealers with reference to the transactions covered by those counts as to which the jury convicted may be summarized as follows:

*Moskowitz* (Inf. I, count 1, R. 2-3).

The Moskowitzes, father and son, were retail butchers who did a business of \$100,000 a year, the father owning the place (R. 106). On November 24, 1943, Moskowitz's father told him to go to petitioner's market and pick up some



turkeys. He went to the market and was told that they had 10 boxes of turkeys for him (R. 108). The turkeys and 4 barrels of chicken feet were placed on his truck. While his father had not told him to pick up chicken feet, he was advised at petitioner's market that his father had bought them. (R. 111.) He was given 2 bills, one for \$358.09 for turkeys (875 pounds), and one for \$64.05 for chicken feet (427 pounds at 15 cents per pound) (R. 112, Exs. 14 and 15, R. 106.) Both bills were paid (R. 113). The chicken feet could not be sold and were "dumped" (R. 112). No complaint was made because "we were lucky to get any merchandise" (R. 126). *Braverman* (Inf. I, counts 2, 3, 4, R. 3-4).

Max Braverman, a retail butcher doing a gross business of about \$60,000 a year, had been trading with petitioner for about 12 years and customarily bought turkeys and chickens during the holiday season (R. 82-83). On November 23, 1943, he spoke with one of petitioner's employees, identified only as "Jack", and he begged him to save a few boxes of turkeys (R. 84). The next day Braverman went to petitioner's place of business and waited for about 2 hours (R. 84). When his name was called by "Charlie", peti-

---

\* At another point he indicated that he spoke to "Nathan" (R. 97, 98), presumably Nathan Lotto, the poultry manager (*supra*, p. 6). Lotto testified that he sold Braverman the 3 barrels of chicken feet which formed the basis of counts 2, 3 and 4 of Inf. I (R. 197).

tioner's lugger placed on Braverman's truck 2 boxes of turkeys and some chicken feet or gizzards (R. 84-85). At 3 different times on that same day Braverman also bought a barrel of chickens and each time he was billed by "Oscar" for the chickens at ceiling prices, and was also charged on each sale for 5 pounds of chicken feet at 20 cents per pound (R. 86-87, 229, Exs. 10-12, R. 83). Braverman testified that he paid for the chicken feet but did not buy them (R. 86-87, 229). He stated that his store was in a poor neighborhood on the East Side and he sold the feet because in his section you could sell whatever you got (R. 88).

*Zweben* (Inf. 1, count 6, R. 5; Inf. 11, count 3, R. 7).

Zweben, who did a business of \$85,000 a year, had been buying poultry from petitioner for 8 or 10 years (R. 141, 147, 149). He placed an order for turkeys with Willie Kraus, a nephew of petitioner's president. He was told that turkeys would be very scarce but that he would be put down for some as he was a steady customer (R. 143). On November 22 he waited at petitioner's place of business for most of the day, and saw the butchers carrying out boxes of turkeys and boxes of chicken feet (R. 144, 146).

<sup>5</sup> An OPA investigator who interviewed Braverman testified that Braverman did not mention any "Oscar" or "Jack" to him (R. 102).

His name was called, and he was told by Willie Kraus that he would be given several boxes of turkeys (R. 144). When he went to the bookkeeper, Mr. Balter, to receive his bill, he was asked "How about some chicken skin?" He replied, "All right, I will take some chicken skin." (R. 144-145; but cf. R. 150.) He had never before purchased or sold chicken skin (R. 145). He was charged \$160.53 for 4 boxes of turkeys (358 pounds) and \$30 for 4 boxes of chicken skin (100 pounds at 30 cents a pound) (Exs. 17 and 18, R. 147). On November 24 he purchased from "Meyer" 4 boxes of turkeys, and was asked if he could use some chicken feet. He said "All right, I will take some chicken feet" (R. 150). He testified that "I figured they do me a big favor by selling me turkeys and it is not more than right to take the chicken feet, even though I did not know whether I was going to sell them or not. I never bought chicken feet before" (R. 148, 150). He was billed \$166.01 for 4 boxes of turkeys (378 pounds) and \$33.90 for two barrels of chicken feet (226 pounds at 15 cents a pound) (Exs. 19 and 20, R. 447). He did not take the chicken feet at the time, but called for them about two weeks later (R. 151, 154). He sold some at 15 and 10 cents a pound and gave the balance to his customers (R. 154).

*Cuet* (Inf. II, count 4, R. 8).

*Cuet*, who did a business of about fifty or sixty thousand dollars a year, had been trading with petitioner for about 5 years (R. 65-66). On November 24 he telephoned a man named "Jake" and told him that he needed some turkeys. He was informed that he would receive his share. (R. 67.) He drove his truck to petitioner's place of business and waited outside. Two boxes of turkeys and one box of chicken feet were loaded on his truck. (R. 68.) He signed two bills, one for \$96.54 for turkeys (211 pounds), and one for \$16.50 for chicken feet (110 pounds at 15 cents a pound) (R. 68; Exs. 6, 7, R. 67). He paid both bills (R. 68-69). He did not ask for the chicken feet, and had never before sold this product (R. 69, 71). He sold a few pounds at 15 cents, and gave away the balance (R. 69-70). *Kuenzlen* (Inf. II, count 5, R. 8-9).

*Kuenzlen*, who did about sixty-five or seventy thousand dollars business a year, had been trading with petitioner for about a year and a half, but his father had been petitioner's customer for about 25 years before that (R. 54). He had never had a customer who requested chicken skins (R. 54). On the morning of November 22 he asked "Nat", one of petitioner's employees, if he could have some turkeys and was told to return in the afternoon (R. 56). That afternoon he waited for several hours until his name was called and then had the turkeys allotted to him loaded on

his truck (R. 56). When he went outside, his chauffeur said "You have 3 cases there." He found that 3 boxes of chicken skin had been loaded on his truck; he had not told "Nat" he wanted chicken skin. (R. 56-57). He was given two bills to sign, one for \$152.38 for the 3 boxes of turkey (340 pounds), and one for \$22.50 for the 3 boxes of chicken skin (75 pounds at 30 cents a pound) (R. 57; Exs. 4 and 5, R. 55). He "made no protest because of the condition today" (R. 56). He sold two pounds of the chicken skins at cost and gave the remaining 73 pounds to a charitable institution (R. 58-59). *Klein* (Inf. II, count 6, R. 9).

Klein, whose business ran around \$65,000 a year, had been dealing with petitioner for about 30 years (R. 71-72). On November 23 he was told that he could have 2 boxes of turkeys (R. 74). When he called for the turkeys, he was given 2 bills by Blankenstein, one for \$89.48 for the turkeys (205 pounds), and 1 for \$15 for one barrel of chicken feet (100 pounds at 15 cents per pound) (R. 75; Exs. 8 and 9, R. 74); and the turkeys and chicken feet were loaded on his truck by petitioner's men (R. 75). He paid both bills (R. 75). He sold about 15 pounds of the feet and gave away the rest (R. 77-78). He had not theretofore bought chicken feet but had occasionally sold some, which he had cut from his own chickens, for the purpose of making soup (R. 72-73, 76).

In defense, Bungard, a retail butcher, was called for the purpose of establishing that there was a demand for chicken feet and chicken skins which he had bought from petitioner (R. 161-162). When the court asked petitioner's counsel the purpose of the testimony, petitioner's counsel replied (R. 162):

\* \* \* I intend putting in testimony here to show that there is and has been a demand for chicken skins, chicken feet, gizzards, that they are customarily sold; that they are bought; that they are dealt and traded in. The government has inferred through all of its testimony that chicken skin and chicken feet are so much waste, that they are dumped; that they are not used and they have opened up the door to this type of testimony.

The trial court ruled (R. 162):

I do not think the government ever put in issue whether or not there was a demand for chicken feet. There has been a demand for chicken feet for some purpose or other. The only thing we are concerned with is whether or not the witnesses who testified purchased chicken feet to meet a demand in their stores.\*

---

\* At an early stage of the case the trial court had indicated that the fact that chicken gizzards had not been sold above the ceiling price in conjunction with the sale of poultry was of no materiality, saying "As I understand it, your client is charged with having forced this man to buy gizzards in order to bill up the price. I don't care whether they are

Subsequently, petitioner's counsel stated that he wished a ruling as to whether witnesses would be allowed to testify that in their "particular neighborhoods" there was a demand for chicken feet, skin, and gizzards. The court stated, "It is not only unnecessary but I direct you not to do it." R. 163).

Petitioner's president denied that he personally made any of the sales as to which the Government's witnesses testified or that he had instructed in those instances, or generally, that the sale of poultry be conditioned upon the purchase of chicken feet or chicken skin (R. 170-171, 172, 174, 177, 191). Petitioner's poultry manager, Nathan Lotto, testified that he sold the three barrels of chickens to Braverman and asked him to buy chicken feet, but denied that he required him to do so in order to get the chickens (R. 197). He also denied that he compelled any of the Government witnesses, or, indeed, any customer, to buy poultry parts in order to obtain poultry or that he was instructed by the president of the corporation to impose such a condition (R. 198, 203). Several of the per-

---

covered by the regulations or not. He is not charged with violating the price of gizzards but billing up the price of chickens." (R. 37.) When it was stated that the ceiling price on gizzards was a certain amount, the court further stated, "Well, I have no interest in that. I wouldn't care if it was fifteen dollars. You have your concession." (R. 38.)



sons mentioned by the Government witnesses were identified by the president and the poultry manager as salesmen (R. 182, 208, 209).

On cross-examination, petitioner's president was questioned about the resale value of chicken skins from the retailer to the general public and he replied that the value was from 25 to 30 cents a pound, that the skin was utilized to produce chicken fat, which was used in the manufacture of chicken salami, patties, and by a "foreign element" for other purposes (R. 183-184). He also testified that the chicken feet had a resale value of from 12 to 16 cents a pound and were used in making soup and gelatin (R. 186). He was further asked, on recross-examination, whether the demand for chicken feet had come from "processors" or from the "ordinary family butcher" and answered that the demand came from retail butchers such as had been on the stand (R. 191). Petitioner's counsel then recalled to the stand Bungard, one of the retail butchers whose testimony had originally been excluded (*supra*, p. 14). This witness testified that he had "created a demand" for chicken feet in his store and had sold it for from 15 to 20 cents a pound (R. 195-196). Petitioner called no further witnesses to testify as to the retail value of chicken feet and skins, although there was an over-night adjournment after Bungard concluded his testimony before the defense rested (R. 216).

In submitting the case to the jury, the trial judge charged that "what these defendants are charged with having done is imposing as a necessary condition to the purchase of turkeys the simultaneous purchase of gizzards, chicken feet or chicken skin, that were utterly useless and valueless to the purchaser." (R. 241.)<sup>7</sup> He subsequently told the jury, "The one question in the case is whether the sale of the chicken skin and feet was a necessary condition to the purchase of the other [the poultry]." (R. 241.)

#### SUMMARY OF ARGUMENT

##### I

a. The informations were drawn and the case was tried on the theory that petitioner was guilty of an evasion of maximum prices if it required the retailers named in the information to purchase chicken skin or chicken feet as a necessary condition to the sale of poultry to them at ceiling prices. There was ample evidence to warrant the

---

<sup>7</sup> In response to an exception to the statement that chicken skins and gizzards and feet were utterly useless to the purchaser, the court stated: "Well, I don't know. I think I modified that to the extent that the evidence showed. I have already told you that any statement of fact about it being utterly useless—there was testimony that they had disposed of some pounds of chicken feet." (R. 243.) Cf. the statement in the charge at R. 242, where the trial judge said that "none of them [the purchasers] had any disposition for it [the feet or the skins] and none of them succeeded in disposing of it with the exception of a few pounds." See also R. 239-240.

jury's conclusion that, as charged in the information, the purchases of these secondary products were compelled.

b. Petitioner's action in compelling purchasers to buy a secondary commodity in order to obtain poultry was an evasion of the maximum prices established for poultry, irrespective of the fairness of the price charged for the secondary product. In return for the sale of poultry, petitioner received the ceiling price plus something more, i. e., an additional sale which it would not have effected except as consideration for the poultry. Similarly the purchasers were required to pay more than ceiling prices for poultry whether or not they could later sell the secondary product, for at the moment of sale, in order to get poultry, they had to expend more than the ceiling price. In this case, it is particularly clear that the purchasers paid more than the ceiling price for they could make no use of the secondary products they were compelled to buy.

The practice of compelling the purchase of secondary products was directly prohibited by the regulation fixing the prices of poultry, which provided that price limitations should not be evaded by direct or indirect methods in the sale of a regulated commodity alone or in conjunction with any other commodity. The general interpretation of maximum price regulations by the Administrator and by all courts which have considered the ques-

tion supports the view that compelled purchases constitute an evasion of price limitations.

c. Since petitioner's action in compelling purchasers to take chicken feet and skin in order to get poultry was, in fact, an evasion of maximum prices for poultry, the trial judge would have committed no error had he adhered to his original ruling excluding evidence offered by petitioner to prove that chicken feet and chicken skin had some general value. It is clear that petitioner offered this evidence merely to establish its theory that a compelled sale of a secondary product is not an evasion if the secondary product is sold at a fair price, and that he did not intend to offer evidence of such a general demand for the secondary products as would tend to show that petitioner had no motive to compel a sale.

Moreover, testimony on the existence of a general market was later allowed in evidence and there is nothing to show that the judge's original ruling kept petitioner from calling additional witnesses if it had wished to do so. The evidence offered by petitioner showed that the retail value of chicken feet and skin was approximately the same as the price for which petitioner was selling the products at wholesale and that the market for these products was a specialized one. It is thus clear that the evidence had no probative value on the issue of compulsion.

## II

Since the compelled sales of chicken skin and feet were effected by salesmen acting within the scope of their employment for the benefit of the corporation in the business of the corporation, corporate criminal liability was established. The extent to which an agent may render the corporation criminally responsible depends on the nature of the act for which liability is to be imposed. Here the offenses involved were sales, and the persons authorized to perform the corporate function of selling were necessarily salesmen. Hence the corporation was properly held liable for the acts of its salesmen.

## III

The court refused defense counsel's request for permission to examine statements shown to Government witnesses in an effort to refresh their recollection as to whether petitioner's president had personally participated in making sales to them. Since the statements were used in an endeavor to establish this one fact, the acquittal of petitioner's president renders academic the question whether it was reversible error to deny counsel's request.

## IV

In his summation the prosecutor made an erroneous statement of the maximum fine which could be imposed under the statute. Such error

was cured by the judge's reiterated instruction to the jury that it was not to consider possible penalties in reaching its verdict.

## ARGUMENT

### I

A SELLER WHO COMPELS A PURCHASER TO BUY ANOTHER COMMODITY IN ORDER TO SECURE A PRODUCT SELLING AT THE CEILING PRICE IS GUILTY OF AN EVASION OF THE PRESCRIBED MAXIMUM PRICE FOR THE DESIRED COMMODITY, IRRESPECTIVE OF WHETHER THE SECONDARY COMMODITY IS SOLD AT NOT MORE THAN THE CEILING PRICE OR AT A FAIR PRICE IF NO MAXIMUM PRICE HAS BEEN ESTABLISHED. HENCE, EVIDENCE THAT ONLY A FAIR PRICE WAS CHARGED FOR THE SECONDARY PRODUCT IS IRRELEVANT

a. The informations were drawn and the case submitted to the jury, as petitioner indicates (Br. 21-22, 28), on the theory that petitioner unlawfully evaded Revised Maximum Price Regulation 269, fixing prices for poultry, if it required the retailers to purchase chicken skin or chicken feet as a necessary condition to the sale to them of poultry. The sufficiency of the evidence on this theory is not here questioned. All the counts on which petitioner was convicted were based on sales in the period from November 22 to November 24, 1943, just before Thanksgiving. That the demand for poultry at that time far exceeded the supply is a matter of common knowledge and is established by the evidence. Thus, petitioner's poultry manager testified that he and petitioner's president arranged

for the rationing of turkeys among customers for the holiday season (R. 202-203, 209-212); one Government witness testified that he "begged" petitioner for turkeys (R. 84), and another that he thought he was receiving a "big favor" by being allowed to purchase turkeys (R. 150). The jury was justified in finding that, under the prevailing conditions of the market, the purchases of chicken feet and chicken skin by Government witnesses were compelled. Despite the reluctance of the witnesses, the evidence is clear that none of them wanted chicken feet or skin or had any real market for these products. With the exception of Moskowitz and Zweben all of them testified that, without previous order or solicitation, the feet and skin were loaded on their trucks together with the poultry, or that they were billed for both commodities without comment. Such action was as explicit as words that the poultry would be sold only in conjunction with the feet or skin. While Moskowitz stated that, when he saw the chicken feet being loaded on his truck, he was told that his father had ordered them, he also testified that his father had not told him to pick up any chicken feet; that they could not sell the chicken feet and had to "dump" them, and that they did not complain about being billed for the feet because they "were lucky to get any merchandise." The jury was entitled to find, we believe, that Moskowitz's



purchase of the chicken feet was not voluntary. As to Zweben, the evidence establishes that he waited at petitioner's place of business most of the day and saw customers carrying out both turkeys and chicken feet. Hence, although he testified that he was asked and agreed to purchase the additional commodities, the jury could properly conclude that his assent was based on his awareness that he could not obtain the poultry which he wanted without making the additional purchases. It is significant that Zweben did not specify the quantity of chicken feet or skin which he wished to purchase but merely accepted the amount given to him by petitioner's employees.

b. Contrary to petitioner's contention (Br. 21-28), petitioner's action in compelling purchasers to buy chicken feet and chicken skin as a necessary condition to the sale to them of poultry was, we submit, an evasion of the maximum prices for poultry established by Maximum Price Regulation 269, irrespective of the fairness of the prices charged for the feet and skin. Maximum Price Regulation 269 fixes the price of poultry at a certain sum per pound. Petitioner did not sell the poultry at such price alone; on each particular sale, it received the ceiling price plus something more, the additional sale of another article. It is of no significance that an independent sale of chicken skin or chicken feet at the prices charged might have been valid. The fact re-

mains that the particular sales of chicken feet and chicken skin here involved would not have been effected except as consideration for the poultry sold. Manifestly, petitioner considered the making of such sales of value, or it would not have exacted this extra consideration. It thus received, as the price of the poultry sold, the ceiling price established by the Regulation, plus the benefits, whatever they might have been, resulting from the particular sales of chicken feet and chicken skin to these particular customers. If, instead of chicken feet and chicken skin, a wholesaler decided to sell his furniture and required each retailer to purchase an article of furniture with each barrel of poultry, it could not seriously be contended, we think, that the poultry was sold at ceiling price merely because the ~~furniture~~ may have been worth the price placed on it as a condition of the sale. The ability to dispose of merchandise is itself a thing of value. It is to be noted that Section 302 (b) of the Act (50 U.S.C. App., Supp. IV, 942 (b)) defines price as "the consideration demanded or received in connection with the sale of a commodity." Here the evidence shows that, by the end of the holiday season, petitioner had disposed of almost all the chicken feet and all the chicken skin it had on hand, thus indicating clearly that it had received a substantial benefit in addition to the established ceiling price, by requiring pur-

chasers to take chicken feet and chicken skin in order to get poultry.\*

Similarly, the purchasers in this case paid more than ceiling prices for the poultry. In order to get the poultry which they needed they had to buy chicken skin and chicken feet which they did not want. Whether or not they sold the chicken feet and chicken skin later, the fact is that they could not purchase poultry for the ceiling price established by the Regulation; at the moment of sale they were required to expend more than the ceiling price to get the desired article. To illustrate, a man who has only \$5 to spend for a Thanksgiving turkey, the ceiling price for which is \$5, can not buy a turkey for \$5 if, in addition, he is required to buy a chicken for \$2, even though the chicken may be worth \$2, and a person with \$7 to spend might buy both. Also, the man with \$7 who has to pay it out to obtain a \$5 turkey, is in effect paying the \$2 additional in order to get the turkey. The necessity of making an undesired purchase is therefore in itself an additional burden to the purchaser and thus a consideration beyond the

---

\* Presumably petitioner received a profit on its sales of chicken feet and skin (see p. 7, *supra*), and while it is true, as petitioner indicates (Br. 52), that the total purchases of chicken feet and skin involved did not exceed \$200, it was brought out at the time petitioner was sentenced (R. 246-247) that during the 9 months' period from April 1, 1943, to December 31, 1943, its volume of business in chicken feet, skin, and gizzards, was about \$19,000.

established price. The case before this Court is even stronger because mathematically it is easy to demonstrate that the purchasers paid more than ceiling prices for the poultry alone, since the evidence is clear that they could not recoup the price they paid for chicken skin and chicken feet. The witness Kuenzlen, for example, paid \$152.38 for 340 pounds of turkey, and \$22.50 for 75 pounds of chicken skin. He sold 2 pounds of the chicken skin at 30 cents a pound and gave the rest away. Thus, the actual cost to him of the 340 pounds of turkey was not \$152.38 but \$174.28, or almost 7 cents extra per pound.

The practice adopted by petitioner was directly prohibited by Maximum Price Regulation 269, which provided in Section 1429.5 that "Price limitations \* \* \* shall not be evaded whether by direct or indirect methods, in connection with any \* \* \* sale, delivery, purchase or receipt of, or relating to, the commodities prices of which are herein regulated, alone or in conjunction with any other commodity \* \* \*." Petitioner attempts to attach significance to the absence from this regulation of the words "tying agreement" which appear in other Maximum Price Regulations and in a later revision of Maximum Price Regulation 269, effective January 1, 1945, a year after the sales involved herein. (Sec. 1.3 (d); 9 Fed. Reg. 15095.) However, there is nothing to indicate that the term "tying agreement" has

a well-defined meaning in the wholesale poultry business, and the revised Regulation does not disclose that such a practice as that of petitioner had been regarded as outside the scope of the prior Regulation." The Regulation here involved plainly prohibits an evasion of maximum prices by any method, direct or indirect, and forbids such evasion whether it occurs in connection with a price-regulated commodity "alone, or in conjunction with any other commodity." Hence if, as we submit, petitioner's practice of compelling the purchase of a secondary product constituted, in fact, an evasion of price limitations, it was in violation of the Regulation just as much as if the Regulation had designated the practice as a "tying agreement", "combination sale", or had used some other description. Cf. *Edelmann v. Bonded Liquors, Inc.*, OPA Desk Book, 2 Opinions and Decisions 2211 (Municipal Court, Los Angeles); see also *Brown v. Banana Distributors*, 52 F. Supp. 804, 805 (D. Conn.).

The Price Administrator has consistently maintained the position that compulsion to purchase a secondary product is an evasion of the maximum prices fixed for the primary product. For example, in an interpretation issued November 5, 1943 applicable to all Maximum Price Regulations (O. P. A. Service (Pike & Fischer) vol. I p. 2:812), the Administrator, in discussing evasion,

<sup>9</sup> The words "tying agreement" were added without definition.

made the following interpretation~~s~~ as to tying agreements:

(a) *As to freeze regulations.*<sup>10</sup> A purchaser may not be required to buy a combination of commodities if he was not required to do so during the base period, because such an arrangement is a tying agreement which results in the seller receiving a larger consideration for his commodity than he charged during the base period.

(b) *As to regulations other than base period freeze regulations.* OPA has also consistently held that any arrangement by which a seller conditions the sale of a commodity in any manner upon the purchase by the buyer of any other commodity is a tying agreement, and constitutes a violation.

*For example*, it is a violation for a seller to compel a purchaser of a load of corn to also purchase a load of alfalfa, even though the total price for the corn, plus the alfalfa, does not exceed the aggregate of the ceiling price for each item, or another example: It is a violation for a seller to compel a purchaser of nylon hose to also purchase a war bond.

The interpretation placed by the Price Administrator on his own regulations is controlling unless clearly erroneous or inconsistent with the

---

<sup>10</sup> Revised Maximum Price Regulation 269 is not a freeze-type regulation. It establishes maximum prices for poultry in terms of dollars and cents, and not in terms of prices charged during a prescribed prior base period.

regulations. *Bowles v. Seminole Rock & Sand Co.*, No. 914, O. T. 1944, decided June 4, 1945. As we have shown, this interpretation is in accord with the specific regulation here involved, and is factually sound. All the courts in which the question has been presented have taken the same position, even in circumstances where the secondary product is more clearly an article of value to the purchaser than the chicken feet and chicken skin involved in the present case. *United States v. Armour & Co.*, 50 F. Supp. 347 (D. Mass.), and *Bowles v. Cudahy Packing Co.*, 58 F. Supp. 748 (W. D. Pa.) (sales of eggs tied to butter); *Brown v. Banana Distributors*, 52 F. Supp. 804 (D. Conn.), and *Bowles v. Inland Trading Co.* (N. D. Ind.), O. P. A. Desk Book, 2 Opinions and Decisions 2223 (sales of vegetables and other fruits tied to bananas); *Bowles v. Coffin-Redington Co.*, O. P. A. Desk Book, 3 Opinions and Decisions 2072 (N. D. Calif.), and *Edelmann v. Bonded Liquors, Inc.*, O. P. A. Desk Book, 2 Opinions and Decisions 2211 (sale of other liquor tied to whiskey); see also *Bowles v. Stafford*, 1 Price Control Cases (C. C. H.) p. 51692 (W. D. La.), in which the court indicated that a compelled purchase of other liquor in order to get whiskey would have been a violation but found that there was no compulsion in the case before it.

We submit that these decisions are clearly correct. The Emergency Price Control Act was designed to "stabilize prices and to prevent specu-



lative, unwarranted, and abnormal increases in prices," and to eliminate "profiteering \* \* \* resulting from abnormal market conditions or scarcities \* \* \*" (Sec. 1, *supra*, pp. 2-3). The inflationary effect of such a practice as that resorted to by petitioner is well stated by the court in *Edelmann v. Bonded Liquors, Inc.*, *supra*, where the court said:

In the case at hand the plaintiff, in order to obtain bourbon whisky, was required to purchase another commodity [gin], whether or not he wanted such other commodity. Consequently, the amount which he paid for this commodity would, in effect, be paid in order to obtain a bottle of whisky. The value of plaintiff's dollars thereby became less when, to buy one article, he had to buy something else in addition, with the result the inflationary spiral was started on its way. It takes little imagination to conceive what would happen if the defendant and others were permitted to circumvent the purposes and objectives of the Act in the manner described. Persons in control of scarce articles, like refrigerators, radios, stoves, and other essential household goods, could by reason of such practice unload quantities of plentiful and unwanted articles on the market, with the result the value of the purchasers' dollars would shrink and the cost of goods would rise. The fact that the charges made for the "tied-in" commodity and the desired article were in the aggregate not in excess

of the maximum prices for such articles would not in any sense lessen the inflationary tendencies of such practices, nor make such practices any less in conflict with the purposes Congress sought to achieve by enactment of the Emergency Price Control Act.

The possibilities of profiteering by unloading plentiful unwanted commodities on purchasers who desire scarce commodities are obvious. Cf. *United States v. Armour & Co.*, *supra*, 50 F. Supp. at p. 349. Moreover, where, as here, the secondary product is purchased by a retailer who cannot sell the secondary product, he is inevitably under a temptation to try to recoup his losses on the secondary product by himself selling the scarce commodity at above-ceiling prices. Permitting sellers to obtain additional compensation by way of compelled purchases of secondary products would thus increase the danger of black markets, and render more difficult the task of enforcing price control.

c. Petitioner's argument that the trial court erred in excluding evidence as to the general market value of chicken feet and chicken skins (Br. 28-32) rests on its contention that the compelled sale of a secondary non-price regulated article is not an evasion of the ceiling price on the primary product if the secondary article is sold at a fair price. Since, as we have shown, this premise is untenable, it follows that the trial

judge would have committed no error had he adhered to his original ruling that the evidence of market value was not admissible for the purpose for which petitioner offered it. As the trial judge stated, "There has been a demand for chicken feet for some purpose or other. The only thing we are concerned with is whether or not the witnesses who testified purchased chicken feet to meet a demand in their stores," (R. 162) i. e., whether the purchase of the secondary commodity was compelled. That this was the trial judge's theory of the case clearly appears from his later statement in his charge that "The one question in the case is whether the sale of the chicken skin and feet was a necessary condition to the purchase of the other [the poultry]" (R. 241; see also R. 38-39).

The dissent in the court below (R. 277) is based on the theory that proof of the existence of a market for chicken feet and chicken skin was relevant to the issue of intent, presumably on the theory that such proof would tend to negate the existence of compulsion on the part of the seller. It is clear, however, that the testimony was not offered for such purpose. Petitioner was merely trying to establish that chicken feet and chicken skin were not worthless to retailers; it was not attempting to prove that the demand was so great that petitioner would have no motive to compel a sale. Trial counsel, in offering the evidence as to the market value,

stated that the Government had inferred that the feet and skin were wasted, and that he therefore wanted to prove that they were customarily sold; that they are "dealt and traded in" (R. 162). Subsequently, he stated that he wished to call witnesses who would testify that "in those particular neighborhoods" feet, skin, and gizzards were sold (R. 163). Manifestly, all that petitioner hoped to establish was that some retailers could sell chicken feet, a fact which would have little, if any, probative value on the question of whether the particular witnesses who testified for the Government bought feet and skin voluntarily or were compelled to take these commodities in order to get poultry.

Furthermore, evidence as to general demand and resale value was finally permitted. As appears from the statement (*supra*, p. 16), petitioner's president was cross-examined as to the existence of a market for chicken feet and chicken skins and their retail value, and petitioner then recalled the witness Bungard, one of the retailers whose testimony had originally been excluded. This witness was then permitted to testify that he had "created a demand" for chicken feet in the store and had sold it at between 15 and 20 cents a pound. We think there is no basis in the record for the dissenting judge's opinion that the original ruling by the trial judge barred petitioner from then offering the testimony of other retailers (R. 277). There was an

over-night adjournment after petitioner's president had testified and the witness Bungard had been recalled (R. 216). Assuming, as did the dissenting judge, that petitioner's other witnesses had been excused after the trial judge's original ruling, the witnesses, all presumably from the metropolitan district, could easily have been summoned to reappear the next day. In view of defense counsel's care throughout the trial to take exception to adverse rulings, it is reasonable to assume that, if he were unable to call witnesses whom he wished to present, he would have so stated. Petitioner's counsel may very well have felt that the testimony of petitioner's president and of the witness who had been recalled had sufficiently covered the subject, for, as appears from his own statement when he originally proposed to call the witnesses, the testimony of others would have been merely cumulative (R. 163).

A consideration of the testimony which was offered as to the existence of a market indicates that such additional evidence would have had no probative value on the question of compulsion. According to petitioner's president, chicken skin is used to produce chicken fat which is utilized in the manufacture of chicken salami and patties and by "a foreign element" for other purposes (R. 184). He also testified that a demand for chicken feet for soup or gelatine had developed only in the last two years (R. 186). By his own admission, the retail value of skin was 25 to 30 cents a

pound, and the retail value of feet was 12 to 16 cents a pound (R. 184, 186), i. e., the retail value was approximately the same or less than the price for which petitioner sold the products at wholesale. This evidence, while it may have tended to prove the fact for which it was offered, i. e., that feet and skin are not utterly worthless, certainly did not tend to disprove compulsion. The fact that retail butchers could sell the product for the same or less than the price at which they bought it does not tend to establish a motive to buy, and the fact that there was a special market for these products in certain neighborhoods does not tend to dispel the existence of a motive to compel a sale. Since there was thus no real exclusion of evidence, and since the evidence offered had no significant probative value on the one issue to which it might have been material, i. e., the existence of compulsion in the sale, we submit that there is no foundation for the claim that the court erred in excluding evidence.

## II

SINCE THE COMPELLED SALES WERE EFFECTED BY PERSONS ACTING ON BEHALF OF THE CORPORATION, FOR THE BENEFIT OF THE CORPORATION, AND WITHIN THE SCOPE OF THEIR AUTHORITY, THE CORPORATION IS CRIMINALLY LIABLE FOR SUCH SALES

Petitioner argues that a corporation cannot be held liable for an offense requiring criminal intent unless it is shown that its "governing of-



ficers" <sup>11</sup> participated in the transaction (Br. 32-52). It implements its argument by pointing out that the only <sup>general</sup> officer of petitioner corporation whose name is mentioned in the record was acquitted of the charges made against him and asserts that none of the sales was made by as high an employee as a branch manager.

Preliminarily it may be observed that petitioner did not take any specific exception to the charge of the trial court that any salesman had assumed authority to represent the corporation and that the corporation was liable for a sale effected by any one of the salesmen (R. 241).<sup>12</sup> Nor did it ask for any instruction embodying the theory of corporate liability which it now urges. The point is not discussed in petitioner's brief in the circuit court of appeals and is not considered in either of the opinions in that court. Additionally, it may be pointed out that Nathan Lotto, conceded by petitioner's president to be the poultry manager (R. 165, 173; see also R. 197), admitted that he made the sales of chickens upon which the three Braverman counts were predicated (R. 197).

Aside from these considerations, petitioner's argument is based, principally, on a misinterpretation of the decision of this Court in *Lake Shore etc. Railway Co. v. Prentice*, 147 U. S.

<sup>11</sup> Petitioner defines this term as meaning a general manager or other representative "wielding the whole executive power of the corporation" (Br. 48).

<sup>12</sup> After taking certain specific exceptions, petitioner merely entered a general exception to the entire charge (R. 243-244).



101. That decision merely holds that the malice necessary to sustain a verdict for punitive damages<sup>13</sup> against a corporation must be brought home to the governing officers of the corporation (147 U. S. at page 111); it does not hold, as petitioner claims, that the intent of an agent who is not a governing officer may never be imputed to the corporation. On the contrary, the decision specifically declares:

A corporation may even be held liable for a libel, or a malicious prosecution, by its agent within the scope of his employment; and the malice necessary to support either action, if proved in the agent, may be imputed to the corporation. (147 U. S. at pages 109-110.)

As pointed out by Judge Edgerton in his article entitled *Corporate Criminal Responsibility*, 36 Yale Law Journal 827 (1927), the courts, in the past 75 years, "have progressed from very narrow views to or toward broad views of corporate criminal responsibility." The decision of this Court in *New York Central Railroad v. United States*, 212 U. S. 481, indicates that, in the federal courts, the criminal liability of a corporation is the same as its ordinary tort liability, i. e., that a corporation may be held criminally responsible for the acts of

<sup>13</sup> The Court stated that punitive damages may be awarded "if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligation" (147 U. S. at page 107).

its agents while acting within the scope of their employment in the business of the corporation. See, also, *Egan v. United States*, 137 F. 2d 369, 379 (C. C. A. 8), certiorari denied, 320 U. S. 788, where the court stated: "There is no longer any distinction in essence between the civil and criminal liability of corporations, based upon the elements of intent or wrongful purpose." While it is true that the *New York Central* case did not involve a crime requiring intent, the discussion of tort liability in that case indicates that the intent of an agent may be imputed to the corporation in criminal cases just as it may be in tort cases. A number of Circuit Courts of Appeals have applied the general principle enunciated in the *New York Central* case to crimes in which intent is a necessary element of the offense. *C. I. T. Corp. v. United States*, 150 F. 2d 85, 89-90 (C. C. A. 9); *Egan v. United States*, 137 F. 2d 369, 379 (C. C. A. 8), certiorari denied, 320 U. S. 788; *Minnisohn v. United States*, 101 F. 2d 477, 478 (C. C. A. 3); *Joplin Mercantile Co. v. United States*, 213 Fed. 926, 935-936 (C. C. A. 8), affirmed, 236 U. S. 531.<sup>11</sup> Although some of these cases do happen to involve higher

---

<sup>11</sup> Since a corporation can act only through agents, the problem of corporate criminal responsibility is not the same as that of the criminal responsibility of an individual for the acts of his agent. This is recognized by the authorities upon which petitioner relies (Br. 33-36, 38). See Sayre,

corporate officials, the decisions are not based on this circumstance but on the fact that the agents were acting on behalf of the corporation within the scope of their employment. In *Zito v. United States*, 64 F. 2d 772, 775 (C. C. A. 7), a corporation was held criminally liable for conspiracy, a crime requiring intent, on the basis of sales effected by a salesman. That decision rests, not on the finding that superior corporate officers participated in the transactions, but on the ground that the salesman was acting for the corporation in the scope of his employment.

The extent to which an agent may render the corporation criminally responsible depends on the nature of the act for which liability is to be imposed. The question is fully discussed by the Ninth Circuit in the *C. I. T.* case, *supra*, in which a national corporation was held criminally liable for the acts of a branch manager <sup>knowingly</sup> in causing fraudulent F. H. A. applications to be made even though the applications were transmitted to the Government, not by him, but by higher corporate officers. The court held that evidence that the higher officers did not know of the branch manager's frauds and that the branch manager acted contrary to instructions, was irrelevant and properly excluded. As that decision points out, the rule applied in the federal courts is that stated by Jus-

*Criminal Responsibility for Acts of Another*, 43 Harv. L. Rev. 689 and 721; Mechem, *Agency*, Vol. 2, 2d ed., sec. 2008 at p. 1579 n. 76.

tice Atkin in *Mousell Bros. v. London and Northwestern Railway Co.*, 2 K. B. (1917) 836, 846:

When a penalty is imposed for the breach of the duty, it is reasonable to infer that the penalty is imposed for the default of a person by whom the duty would ordinarily be performed.

In this case the offenses involved were sales, and the persons performing the duty to sell were necessarily salesmen. It is clear that these salesmen, in requiring retailers to take chicken skins and chicken feet as a necessary condition to the sale of poultry, were acting within the scope of their employment, in the course of petitioner's business, for petitioner's benefit. Petitioner's president admitted that he told the salesmen to sell feet and skin, that the products sold were corporate products, and that the money received was retained by the corporation (R. 187-189). The intent of the salesmen was therefore properly imputed to the corporation.

The crime here charged is a misdemeanor, not involving moral turpitude. The term "willfully" as used in Section 205 (b) of the Emergency Price Control Act means no more than that the act constituting a violation must be knowingly and intentionally performed; that no proof of evil purpose was required. *Zimberg v. United States*, 142 F. 2d 132, 137 (C. C. A. 1), certiorari denied, 323 U. S. 712. See also *Browder v. United States*, 312 U. S. 335, 341. Just as, in fixing civil lia-

bility, there is a recognized distinction between the specific intent, such as an intent to prosecute falsely, which will support an action in tort, and the additional malice necessary to sustain punitive damages, so in interpreting criminal statutes punishing willful conduct, this Court has recognized that some offenses require merely intentional conduct, whereas others require an evil motive as well. *Screws v. United States*, 325 U. S. 91, 101; *Hartzel v. United States*, 322 U. S. 680, 686; *Spies v. United States*, 317 U. S. 492, 497; *Browder v. United States*, 312 U. S. 335, 341. Hence, even if, as petitioner contends, the principles laid down in respect of the liability of corporations for punitive damages should be applied in determining criminal responsibility, we think that such a rule would require participation of the governing officers of a corporation only where an evil purpose is a necessary element of the crime. See, for example, *American Socialist Soc. v. United States*, 266 Fed. 212, 214 (C. C. A. 2), certiorari denied, 254 U. S. 637, where the jury was instructed that the corporation was not guilty of a violation of the Espionage Act unless the board of directors or membership of the corporation authorized the obstruction of the recruitment and enlistment services.<sup>15</sup>

<sup>15</sup> The evidence in this case would undoubtedly warrant a finding that responsible corporate officials were aware of and participated in the practices upon which the petitioner's conviction was based. The facts that the feet and skin were made available for the holiday season, that rationing of

This is not such a case. Considering the purpose of the Emergency Price Control Act to protect the general public from the effects of inflation, the nature of the act prohibited, and the fact that a violation is made merely a misdemeanor, we think it is clear that no such culpable intent is required as would justify a strict rule of corporate responsibility. Cf. *United States v. Illinois Central R. Co.*, 303 U. S. 239, 242, in which a railroad was held liable for a penalty imposed for willful conduct because of the default of its yardmaster. Salesmen authorized to sell could therefore bind the corporation for sales constituting violations of maximum price regulations.

turkeys, had been agreed upon with petitioner's president, that various salesmen acted in the same manner, that the bills issued were corporate bills, and that the money was accepted by the corporation, indicate a deliberate plan by persons in charge, as well as a ratification of the transactions. The acquittal of petitioner's president in no way negatives this inference because it is clear that the prosecutor acted on the theory that he had to prove personal participation of the president in the actual sales (see R. 233), and the jury apparently found that such fact was not proved. Moreover, a corporation may be found guilty even if its responsible officers are acquitted. *United States v. General Motors Corporation*, 121 F. 2d 376, 411 (C. C. A. 7), certiorari denied, 314 U. S. 618.

## III

THE ACQUITTAL OF PETITIONER'S PRESIDENT RENDERS ACADEMIC THE QUESTION WHETHER IT WAS REVERSIBLE ERROR FOR THE TRIAL JUDGE TO REFUSE DEFENSE COUNSEL AN OPPORTUNITY TO EXAMINE STATEMENTS SHOWN TO GOVERNMENT WITNESSES IN AN EFFORT TO REFRESH THEIR RECOLLECTION AS TO THEIR TRANSACTIONS WITH THE PRESIDENT

Petitioner's president, Max Kraus, was named as a codefendant in the first information covering the Moskowitz, Braverman and one of the Zweben transactions (R. 2-5). Braverman was the first of these witnesses to take the stand. He testified to purchases of turkey, chicken, and chicken feet as set forth in the Statement, *supra*, and stated that the bookkeeper, "Oscar," had given him the bills for these commodities (R. 86). He denied that he had previously told an O. P. A. investigator that his dealings were with Max Kraus personally (R. 89). Subsequently, he was asked to read Government's Exhibit 13 for identification (a statement signed by him before an O. P. A. investigator) (R. 96-97, 100-103), but he stated that he had difficulty in reading handwriting (R. 90). He was then shown a typewritten paper (a transcript of questions put to the witness by the Assistant United States Attorney and the answers given by him R. 92-95) and was requested to read it (R. 90-91). At this point there ensued the following colloquy between court and defense counsel (R. 91):

Mr. SAHN: I ask now that that testimony be shown to me before the witness testifies



as to it. Under the decision of the Supreme Court in *United States v. Socony Vacuum Oil Company*, where it was held that where the grand jury minutes are used to refresh a witness's recollection—

MR. MCAULEY: These are not grand jury minutes.

MR. SAHN—it is discretionary with the Judge whether or not such minutes might be used to refresh his recollection, and I am not questioning your Honor's discretion here in allowing this witness's recollection to be refreshed, but the court also held that under such circumstances opposing counsel is entitled to see a copy of the minutes.

THE COURT: I haven't been exercising any discretion. I would hold that the United States had an absolute legal right to insist on doing precisely what it has done. I will deny your application, which I understand is for permission to read what the witness has read.

MR. SAHN: My application is to read then the original affidavit allegedly signed by that witness on which those questions and answers are based.

THE COURT: I do not even know that there was an affidavit signed by him. I deny your application no matter how you phrase it, if it is to read the matter that has just been presented to the witness.

MR. SAHN: Exception.

Braverman was asked whether a reading of the paper refreshed his recollection, and he replied

affirmatively (R. 91). He then testified that at the time of his purchases, he had not spoken to anyone (R. 92). The Assistant United States Attorney read some questions and asked the witness whether he had put these questions to him on April 19 (R. 92-93). The witness affirmed the questions and answers until the prosecutor read the question, "What conversations did you have with Kraus?" As to this, the witness answered "I don't remember that" (R. 93). The question was again read, and the witness answered "With Kraus people, not with Kraus alone, because I never talked to the man" (R. 93). After some further questions were read, the court directed the Assistant United States Attorney to discontinue (R. 94). The next day, the witness was again shown Exhibit 13 for identification (R. 96), and he stated that he understood some of it (R. 98-99). He was then asked whether Max Kraus was present when he bought the chickens, and he replied that he had not seen him (R. 99-100). Petitioner's counsel did not cross-examine Braverman (R. 100).

The Government attempted to offer Braverman's signed statement in evidence after an O. P. A. investigator had testified to the circumstances under which it was taken (R. 100-103). At that time the exhibit was shown to petitioner's counsel (R. 103). The trial judge excluded the exhibit on the ground that it was no proof of its contents (R. 103).

When Moskowitz testified, he was asked with whom he had conversed and who had given him the two bills for turkey and chicken feet. After stating that he had not seen Max Kraus and after failing to identify the man who gave him the tickets (R. 111-112), Moskowitz was shown Government's Exhibit 16 for identification,<sup>16</sup> and he acknowledged his signature (R. 113). He was then asked whether it refreshed his recollection as to the person who handed him the bills and with whom he conversed (R. 113); and he testified that the tickets were made out by two different people but that he could not remember who filled them out (R. 114-116). Defense counsel did not request permission to examine this exhibit. Moskowitz was then asked whether the exhibit refreshed his recollection as to the presence of Max Kraus on November 24, and he answered that Max Kraus was not present (R. 116). Some of the questions put to him by the United States Attorney and the answers he gave were read to him (R. 116-118). He acknowledged his answers until the prosecutor read the question "When M. Kraus said 'I have four barrels of chicken feet for you,' did you say 'What am I going to do with them?'" He testified that the question had been put to him but denied that he had answered

<sup>16</sup> This exhibit apparently consisted of two documents, one a statement given by the witness to an O. P. A. investigator in December 1943, and the other a transcript of an interview with the United States Attorney in April 1944 (R. 113-115, 116).

"That's right" (R. 118-119). When another question and answer were read in which the name of Max was mentioned, the witness said the name should have been McNamara (R. 119). After other questions and answers were read in which the name of Max Kraus was mentioned (R. 119-121), Moskowitz was again handed one of the papers and asked whether he recalled anything about the transactions (R. 121), to which he replied "I am just trying to figure out who marked these tickets and then I can tell you the whole story on that part, but I just can't remember who marked these tickets" (R. 122). On cross-examination he stated that he did not remember seeing Max Kraus that day; that when he referred to Kraus in his talk with the United States Attorney, he meant the firm and not the individual (R. 128-130). On re-direct examination his attention was directed to nine words of Exhibit 16 for identification, but, at the judge's direction, he was not permitted to read them aloud (R. 133-134). After further examination about those words (R. 134-137), he testified that they might be true, that he might have been waited on by Max Kraus but that he was not certain (R. 138-1393).

Zweben was also asked whether he saw Max Kraus on November 22 and answered that he thought that Kraus was there (R. 146-147). He was asked whether Kraus was present on November 24 (the date of the sale charged against Kraus personally) and he replied that he could not re-

member whether it was the 22d or 24th (R. 149). He was shown a signed statement and was asked whether it refreshed his recollection (R. 152). He then testified that he saw Kraus but did not speak to him (R. 152-153).

During the prosecutor's summation, in apparent rebuttal to defense counsel's statement that he could not understand why Max Kraus had been mentioned in one information and not in the other, the United States Attorney referred to the fact that only some witnesses had made statements showing dealings with Kraus personally (R. 233). The Court on its own motion stated: "\* \* \* I instruct the jury now that as a statement of fact the contents of those statements, if they were made, are not before you as the District Attorney's statement as to what they contain is not to be considered by any of you" (R. 234). Max Kraus was acquitted by the jury (R. 245).

We do not dispute petitioner's contention that the trial judge had discretion to permit counsel to examine the statements and that, in a situation such as this, where they were handed to the witness, it would have been better procedure to allow defense counsel to see them unless there were compelling reasons for a contrary ruling. *United States v. Socony Vacuum Oil Co.*, 310 U. S. 150, 231-237; Wigmore on *Evidence*, 3d ed., sec. 762. However, the acquittal of Max Kraus eliminates from the case the question of whether the failure to permit examination of these documents was

prejudicial error. The statements were used for only one purpose, to have the witnesses testify that they had dealt with Max Kraus personally. All these witnesses had already testified to the circumstances of their purchases of poultry and chicken feet or skin before the prosecutor asked them about their dealings with Max Kraus and showed them their affidavits in an attempt to refresh their recollection on this one point. Only slight evidence of the transactions which did not relate to Max Kraus personally came into the record as the questions and answers were read to the witnesses, and such evidence added nothing to the testimony which the witnesses had already given before the statements were shown to them. The United States Attorney never succeeded in getting the witnesses to testify in accordance with their statements except for Moskowitz's final limited admission that Max Kraus might have been present and Zweben's testimony that he saw Kraus but did not speak to him. The judge never allowed the contents of the statements to be accepted as evidence, and specifically instructed the jury to such effect. That the jury followed the admonition of the court and did not credit the qualified admissions by Moskowitz and Zweben is shown by the fact that it acquitted Kraus. As we have shown in point II (*supra*), it was not necessary to the Government's case to prove that Kraus, as a governing officer of the corporation, participated in the transactions, and the jury could not

have thought so for the court instructed them that any salesman had assumed authority to represent the corporation, and that the corporation was liable for a sale effected by any one of the salesmen (R. 241). As the judge told the jury, the one issue in the case was whether the admitted sales of chicken feet and chicken skin were voluntary or compelled (R. 241). The presence or absence of Max Kraus had no bearing on that question.

#### IV

THE PROSECUTOR'S INCORRECT STATEMENT OF THE MAXIMUM PENALTY APPLICABLE TO THE OFFENSES CHARGED WAS CURED BY THE COURT'S DIRECTION TO THE JURY TO DISREGARD POSSIBLE PENALTIES.

In his closing argument, Government counsel stated that he thought the defense had resorted to a shabby trick in referring to the possibility of a five-year prison sentence against Max Kraus individually when there was no likelihood that any such sentence would be imposed. He stated, "That is none of your business, none of mine, that is, the jail sentence involved. \* \* \* The maximum for each count in this court on this charge is one year in jail and a \$1,000 fine. \* \* \* (R. 233). The maximum fine for each offense is in fact, \$5,000, but the mistake was not called by petitioner to the attention of Government counsel or the court before the jury retired (cf. R. 247).

Petitioner contends that the prosecutor's misstatement may have induced conviction of the corporation and that the error should at least



call for a reduction of the fines imposed (Br. 57-58).

However, at the very opening of his charge the trial judge told the jury (R. 235):

You will make up your minds solely and wholly on what you find the testimony to be. You are not to consider the penalty or the possible penalty in this case. Both lawyers, in my opinion, should not have told you about it.

Subsequently, he again instructed the jury (R. 236):

\* \* \* You are the ones that are to judge the case, and you are to do that not from any extraneous consideration such as the penalty, because that is none of the jury's business. It has nothing to do with justice. You exercise the prerogative of doing justice between the two contenders in this case. You have nothing to do with the penalty. That is entirely up to me. Please do not consider it. As I said, that is none of the jury's business.

Since it must be presumed that the jury followed the judge's instruction,<sup>17</sup> the explicit and reiterated instruction not to consider the penalty cured the error in the prosecutor's summation. Cf. *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 243, *Sawyer v. United States*, 202

<sup>17</sup> *Hines v. United States*, 131 F. 2d 971, 974 (C. C. A. 10); *Landay v. United States*, 108 F. 2d 698, 706 (C. C. A. 6), certiorari denied, 309 U. S. 681; *Suhay v. United States*, 95 F. 2d 890, 895 (C. C. A. 10), certiorari denied, 304 U. S. 580.

U. S. 150, 168; *Dunlop v. United States*, 165 U. S. 486, 498; *Moore v. United States*, 132 F. 2d 47, 48 (C. C. A. 5), certiorari denied, 318 U. S. 784; *Landay v. United States*, 108 F. 2d 698, 706 (C. C. A. 6), certiorari denied, 309 U. S. 681.

As the court below indicated (R. 272), the assessment of \$2,500 upon each of the nine counts upon which petitioner corporation was convicted bore a relation to the total income derived by the corporation from the sale of the extra commodities. (See R. 246-247.)

#### CONCLUSION

The case was tried upon correct principles of law and there were no reversible trial errors. We therefore respectfully submit that the judgment of the court below should be affirmed.

✓ J. HOWARD McGRATH,  
*Solicitor General.*

✓ THERON L. CAUDLE,  
*Assistant Attorney General.*

✓ W. MARVIN SMITH,  
*Special Assistant to the Attorney General.*

✓ ROBERT S. ERDAHL,  
✓ BEATRICE ROSENBERG,  
*Attorneys.*

DECEMBER, 1945

# SUPREME COURT OF THE UNITED STATES.

No. 198.—OCTOBER TERM, 1945.

M. Kraus & Bros., Inc., Petitioner, } On Writ of Certiorari to  
vs. } the United States Circuit  
United States of America. } Court of Appeals for the  
Second Circuit.

[March 25, 1946.]

Mr. Justice MURPHY announced the conclusion and judgment of the Court.

The problem here is whether the petitioner corporation was properly convicted of a crime under the Emergency Price Control Act of 1942.<sup>1</sup>

The petitioner is engaged in the wholesale meat and poultry business in New York City. Poultry is a commodity subject to the provisions of Revised Maximum Price Regulation No. 269,<sup>2</sup> promulgated by the Price Administrator pursuant to Section 2(a) of the Emergency Price Control Act of 1942. Two informations, each containing six counts, were filed against petitioner. Each count alleged that, as an integral part of a specified sale of poultry on a day during the Thanksgiving season in November, 1943, the petitioner "unlawfully, wilfully and knowingly evaded the provisions of said Revised Maximum Price Regulation No. 269, Sec. 1429.5, by demanding, compelling and requiring" the retail buyer to purchase chicken feet or chicken skin at a specified price as a condition of the sale of the poultry. Petitioner's president was named as a co-defendant in the first information and the two informations were consolidated for trial purposes.

The theory of the Government is that the petitioner was guilty of an evasion of the price limitations set forth in this particular regulation if it required the purchase of chicken feet and skin as a necessary condition to obtaining the primary commodity, the poultry. This practice is commonly known as a "combination sale" or a "tying agreement." It is argued that the petitioner thereby received for the poultry the ceiling price plus the price of the secondary commodities, the chicken parts.

<sup>1</sup> 56 Stat. 23; 50 U. S. C. App. § 901 *et seq.*

<sup>2</sup> 7 Fed. Reg. 10708, reissued with amendments; 8 Fed. Reg. 13513.

The evidence was undisputed that the poultry was billed by petitioner at ceiling prices fixed by the Price Administrator and that no ceiling prices had been set for chicken feet or chicken skin. It was also undisputed that the demand for poultry during the Thanksgiving season far exceeded the supply and that petitioner voluntarily imposed a rationing system among its customers.

The Government's case rested primarily upon the testimony of seven retail butchers who had purchased poultry and poultry parts from petitioner during the period in question. Only one of them testified explicitly that the sale of poultry to him had been conditioned upon the sale of poultry parts which he did not want and for which there was no consumer demand. His testimony, however, was disbelieved by the jury since it acquitted the petitioner on the two counts involving sales to him. With two exceptions, the other butchers testified either that the feet and skins were loaded on their trucks without previous order or solicitation along with the poultry or that they were billed for both the poultry and the parts without comment. Five of them stated that they sold a small amount of the chicken parts and gave away the balance; one remarked that he could not sell any parts and was forced to dump them. There was no explicit evidence that any of the butchers protested, sought to return the chicken parts or asked to buy the poultry separately. It was reasonable, however, for the jury to find that the sale of poultry was conditioned upon the simultaneous sale of the chicken parts and no contrary claim is made before us.

Several times the petitioner tried to introduce testimony establishing that there was a demand for chicken parts and that they were of value. Petitioner's counsel stated that "The government has inferred through all of its testimony that chicken skin and chicken feet are so much waste, that they are dumped; that they are not used and they have opened up the door to this type of testimony." But the trial judge ruled that the Government had not put that matter in issue and that the "only thing we are concerned with is whether or not the witnesses who testified purchased chicken feet to meet a demand in their stores." He accordingly refused to admit the proffered testimony from petitioner's witnesses, stating to petitioner's counsel that "I direct you not to put them on the stand."

On cross examination, however, petitioner's president was questioned as to the resale value of chicken skins from the retailer to

the general public. He stated that the value was from 25 to 30 cents a pound and that the skin was used to make chicken fat. He also testified that chicken feet had a resale value of from 12 to 16 cents a pound and were used in making soup and gelatin. He further stated that the demand for chicken feet came from retail butchers such as had been on the stand. Petitioner's counsel then recalled one of the retail butchers whose testimony previously had been excluded by the court. He testified that he had bought chicken feet from the petitioner, had "created a demand" for them in his store, and had sold them for from 15 to 20 cents a pound. No further witnesses were called in regard to the retail value of chicken feet and skins.

In submitting the case to the jury, the judge stated that "what these defendants are charged with having done is imposing as a necessary condition to the purchase of turkeys the simultaneous purchase of gizzards, chicken feet or chicken skin, that were utterly useless and valueless to the purchasers. In order to violate the law these defendants must have made more than the fixed price of  $37\frac{1}{2}$  cents on the chickens, or the turkey price of 40 to 45 cents. And the testimony about the use of these additional articles sold, the use that can be made of them, will enable you to determine that they were sold at prices—and the prices are on all these slips that are in evidence—entirely out of line with any value that attaches to them, so that it is almost entirely profit to these defendants, and in doing that, by making the purchase of these things at the prices fixed, the defendants both realized a greater consideration than the Office of Price Administration allows for the commodity sold." He also told the jury that the "one question in the case is whether the sale of the chicken skin and feet was a necessary condition to the purchase of the other [poultry]."

The jury acquitted petitioner's president but convicted the petitioner on nine counts. Petitioner was fined \$2,500 on each count, a total of \$22,500. The conviction was affirmed by the court below, one judge dissenting because of the exclusion of petitioner's proffered testimony. 149 F. 2d 773. In our opinion, however, the conviction must be set aside.

Section 205(b) of the Emergency Price Control Act of 1942 imposes criminal sanctions on "Any person who willfully violates any provision of section 4 of this Act." Section 4(a) of

the Act in turn provides that "It shall be unlawful . . . for any person to sell or deliver any commodity, . . . in violation of any regulation or order under section 2 . . ." Section 2(a) authorizes the Price Administrator under prescribed conditions to establish by regulation or order such maximum prices "as in his judgment will be generally fair and equitable and effectuate the purposes of this Act." Section 2(g) further states that "Regulations, orders, and Requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof."

The Price Administrator, pursuant to Section 2(a), issued Revised Maximum Price Regulation No. 269 on December 18, 1942,<sup>3</sup> which regulation was in effect at the time the poultry sales in question were made. Section 1429.5 of this regulation, referred to in the informations, stems from Section 2(g) of the Act. It is entitled "Evasion" and reads as follows: "Price limitations set forth in this Revised Maximum Price Regulation No. 269 shall not be evaded whether by direct or indirect methods, in connection with any offer, solicitation, agreement, sale, delivery, purchase or receipt of, or relating to, the commodities prices of which are herein regulated, alone or in conjunction with any other commodity, or by way of commission, service, transportation, or other charge, or discount, premium, or other privilege or other trade understanding or otherwise."

The manifest purpose of Congress in enacting this statute was to preserve and protect the economic balance of the nation during a period of grave emergency, thereby achieving the prevention of inflation and its consequences enumerated in Section 1. *Yakus v. United States*, 321 U. S. 414, 423. That aim was implemented by criminal sanctions to be imposed on those who deliberately choose to ignore the national welfare in this respect by selling commodities at prices above established levels. As appears from a combined reading of Sections 205(b), 4(a) and 2(a), criminal liability attaches to any one who willfully sells commodities in violation of a regulation or order of the Price Administrator establishing maximum prices.<sup>4</sup> Cf. *United States v. Eaton*, 144 U. S.

<sup>3</sup> Reissued with amendments on October 8, 1943. See note 2.

<sup>4</sup> Section 205(b) is somewhat inartistically drawn. It does not specifically impose criminal liability on those who violate the regulations and orders of the Administrator. But the hurdle of *United States v. Eaton*, 144 U. S. 677, is cleared by the reference in Section 205(b) to Section 4, which makes it



677. Recognizing that sales at above-ceiling prices may be accomplished by devious as well as by direct means, Congress in Section 2(g) authorized the Administrator to make provisions against circumvention and evasion of maximum prices. Hence one who willfully sells commodities at prices above the maximum in an evasive manner specified by the Administrator subjects oneself to criminal liability. These statutory warnings are clear and unambiguous. When incorporated with such definite and clear regulations and orders as the Administrator may promulgate, the provisions of the Act leave no doubt as to the conduct that will render one liable to criminal penalties.

This delegation to the Price Administrator of the power to provide in detail against circumvention and evasion, as to which Congress has imposed criminal sanctions, creates a grave responsibility. In a very literal sense the liberties and fortunes of others may depend upon his definitions and specifications regarding evasion. Hence to these provisions must be applied the same strict rule of construction that is applied to statutes defining criminal action. In other words, the Administrator's provisions must be explicit and unambiguous in order to sustain a criminal prosecution; they must adequately inform those who are subject to their terms what conduct will be considered evasive so as to bring the criminal penalties of the Act into operation. See *United States v. Willberger*, 5 Wheat. 76, 94-96. The dividing line between unlawful evasion and lawful action cannot be left to conjecture. The elements of evasive conduct should be so clearly expressed by the Administrator that the ordinary person can know in advance how to avoid an unlawful course of action.

In applying this strict rule of construction to the provisions adopted by the Administrator, courts must take care not to construe so strictly as to defeat the obvious intention of the Administrator. Words used by him to describe evasive action are to be given their natural and plain meaning, supplemented by con-

unlawful, among other things, to sell or deliver any commodity in violation of any regulation or order. See *In re Kollock*, 165 U. S. 526; *United States v. Grimaud*, 229 U. S. 506; *United States v. George*, 228 U. S. 14; *Singer v. United States*, 323 U. S. 338. Congress has subsequently emphasized this reference even more clearly when, in adding Section 204(e)(1) to the Emergency Price Control Act, it spoke of a criminal proceeding "brought pursuant to section 205 involving alleged violation of any provision of any regulation or order issued under section 2." Section 107(b), Stabilization Extension Act of 1944, 58 Stat. 639. See also Section 6, Act of June 30, 1945, Public Law 108, amending Section 204(e)(1) of the Emergency Price Control Act.



temporaneous or long-standing interpretations publicly made by the Administrator. But patent omissions and uncertainties cannot be disregarded when dealing with a criminal prosecution. A prosecutor in framing an indictment, a court in interpreting the Administrator's regulations or a jury in judging guilt cannot supply that which the Administrator failed to do by express word or fair implication. Not even the Administrator's interpretations of his own regulations can cure an omission or add certainty and definiteness to otherwise vague language. The prohibited conduct must, for criminal purposes, be set forth with clarity in the regulations and orders which he is authorized by Congress to promulgate under the Act. Congress has warned the public to look to that source alone to discover what conduct is evasive and hence likely to create criminal liability. *United States v. Resnick*, 299 U. S. 207.

In light of these principles we are unable to sustain this conviction of the petitioner based upon Section 1429.5 of Revised Maximum Price Regulation No. 269. For purposes of this case we must assume that the Administrator legally could include tying agreements and combination sales involving the sale of valuable secondary commodities at their market value among the prohibited evasion devices. Any problem as to his power so to provide would have to be raised initially in a proceeding before the Emergency Court of Appeals. *Lockerty v. Phillips*, 319 U. S. 182; *Yakus v. United States*, 321 U. S. 414, 427-431; *Bowles v. Seminole Rock Co.*, 325 U. S. 410, 418-419; *Case v. Bowles*, — U. S. — (slip opinion, p. 3). The only issue bearing upon the regulation which is open in this criminal proceeding is whether the Administrator did in fact clearly and unmistakably prohibit tying agreements of this nature by virtue of the language he used in Section 1429.5. That issue we answer in the negative.<sup>5</sup>

Section 1429.5, so far as here pertinent, provides that price limitations shall not be evaded by any method, direct or indirect, whether in connection with any offer or sale of a price-regulated commodity alone "or in conjunction with any other commodity," or by way of any trade understanding "or otherwise." No specific mention is made of tying agreements or combination sales.

It is urged by the Government that this language fits the type of tying agreement allegedly used by petitioner. The contention

<sup>5</sup> Cf. *United States v. George F. Fish, Inc.*, — F. 2d — (C. C. A. 2, Feb. 8, 1946).

is that petitioner received for the primary commodity not only the ceiling price but also the price of the secondary commodities which the retailers were required to buy. Conversely, the retailers were compelled to pay not only the ceiling price but also the price of the secondary commodities in order to secure the primary commodity, the poultry. Under this theory it is immaterial whether the secondary products, the chicken parts, had any value to the retailers or whether their price was a reasonable one. Reference is made in this respect to Section 302(b) of the Act, defining price as "the consideration demanded or received in connection with the sale of a commodity." Hence it is concluded that the price limitation on the primary commodity was evaded "in conjunction with any other commodity" within the meaning of Section 1429.5. This argument, moreover, represents the consistent interpretation of the Administrator.<sup>6</sup>

But we do not believe that, under the strict rule of construction previously discussed, such an interpretation of Section 1429.5 is dictated by its plain language. It prohibits evasions through sales of price-regulated commodities "in conjunction with any other commodity." That clearly and undeniably prohibits evasions through the use of tying agreements where the tied-in commodity is worthless or is sold at an artificial price, thereby hiding an above-ceiling price for the primary commodity. But to say that the language covers more, that it also applies to a case where the secondary product has value and is sold at its ceiling or market price, is to introduce an element of

---

<sup>6</sup> The Price Administrator has consistently maintained the position that compulsion to purchase a secondary product is an evasion of the maximum prices fixed for the primary product. Thus, in an interpretation issued November 5, 1943, applicable to all maximum price regulations, the Administrator, in discussing violations and evasions, made the following interpretation as to tying agreements:

"(a) *As to freeze regulations:* A purchaser may not be required to buy a combination of commodities if he was not required to do so during the base period, because such an arrangement is a tying agreement which results in the seller receiving a larger consideration for his commodity than he charged during the base period.

"(b) *As to regulations other than base period freeze regulations:* OPA has also consistently held that any arrangement by which a seller conditions the sale of a commodity in any manner upon the purchase by the buyer of any other commodity is a tying agreement, and constitutes a violation.

*For example,* it is a violation for a seller to compel a purchaser of a load of corn to also purchase a load of alfalfa, even though the total price for the corn, plus the alfalfa, does not exceed the aggregate of the ceiling price for each item, or another example: It is a violation for a seller to compel a purchaser of nylon hose to also purchase a war bond."

O. P. A. Service (Pike & Fischer) vol. I, p. 2:812.

conjecture and to give effect to an unstated judgment of policy.

The language of Section 1429.5 is appropriate to and consistent with a desire on the Administrator's part to prohibit only those tying agreements involving tied-in commodities that are worthless or that are sold at artificial prices. The Administrator may have thought that other tied-in sales did not constitute a sufficient threat to the price economy of the nation to warrant their outlawry, or that they were such an established trade custom that they should be recognized. But we are told that he had no such thought, that prohibition of all tying agreements is essential to prevent profiteering, and that this blanket prohibition is the only policy consistent with the purposes of the Act. All of this may well be true. But these are administrative judgments with which the courts have no concern in a criminal proceeding. We must look solely to the language actually used in Section 1429.5. And when we do we are unable to say that the Administrator has made his position in this respect self-evident from the language used.

The Administrator's failure to express adequately his intentions in Section 1429.5 is emphasized by the complete and unmistakable language he has used in other price regulations to prohibit all tying agreements, including those involving the sale of valuable secondary products. Thus he has inserted in the meat regulation a provision prohibiting evasion of price limitations by "offering, selling or delivering beef, veal or any processed product on condition that the purchaser is required to purchase some other commodity." Section 1364.406, Revised Maximum Price Regulation No. 169, as amended March 30, 1943, 8 Fed. Reg. 4099. And in the clothing regulation, the Administrator has provided that "No manufacturer shall make a sale of garments which is conditioned directly or indirectly on the purchase of any other commodity or service." Section 15, Revised Maximum Price Regulation No. 287, issued June 29, 1943, 8 Fed. Reg. 9126. See also Section 1389.555, Maximum Price Regulation No. 330, as amended August 7, 1943, 8 Fed. Reg. 11041.

The very definiteness with which tying agreements of all types were prohibited in regard to many other commodities and the absence of any such prohibition in Section 1429.5 of Revised Maximum Price Regulation No. 269 might well have led a reasonable man to believe that tying agreements involving the sale of a valuable secondary commodity at its market price were

permissible in the poultry business when the transactions in question took place. Certainly the language used by the Administrator did not compel the opposite conclusion. And certainly a criminal conviction ought not to rest upon an interpretation reached by the use of policy judgments rather than by the inexorable command of relevant language.

In view of these considerations we interpret Section 1429.5 as prohibiting only those tying agreements involving secondary products that are worthless or that are sold at artificial prices. It follows that the conviction below cannot stand. While the information can be interpreted as charging a crime under Section 1429.5 as we have read it, the trial judge's charge to the jury was clearly erroneous. There was evidence, at first excluded but later admitted, that the chicken parts which the petitioner sold did have value and were sold at their market price. If the jury believed such evidence it was entitled to acquit the petitioner. But the trial judge charged that the "one" question in the case was whether the sale of the chicken parts was a necessary condition to the purchase of the poultry. On the basis of that charge the jury may well have disregarded as irrelevant the evidence of value as to the secondary products and convicted solely on the ground that there was a tie-in sale. Such a charge is thus reversible error.

There were additional statements in the charge to the jury, to be sure, that the petitioner was charged with having compelled, in connection with the purchase of poultry, the simultaneous purchase of chicken parts "that were utterly useless and valueless to the purchasers" and at prices "entirely out of line with any value that attaches to them." While such statements tended to charge a violation of Section 1429.5, as properly interpreted, they were so intertwined with the incorrect charge as to negative their effect. "A conviction ought not to rest upon an equivocal direction to the jury on a basic issue." *Bollenbach v. United States*, — U. S. —, (slip opinion, p. 5).

The case must therefore be remanded for a new trial, allowing full opportunity for the introduction of evidence as to the value of the chicken parts and charging the jury in accordance with the proper interpretation of Section 1429.5.

*It is so ordered.*

Mr. Justice JACKSON took no part in the consideration or decision of this case.

Mr. Justice DOUGLAS, concurring.

If a retailer sold meat or any other commodity to a consumer only on condition that he purchase and pay for a wholly worthless article, it would be clear that price ceilings had been violated. For the attribution of value to the worthless article would be nothing more than an evasive method of increasing the ceiling price on the other commodity. I can see no difference where the additional commodity, although it has value, has no value to the purchaser.

But this case is different in both respects or so the jury might find. First, chicken gizzards, chicken skin, or chicken feet are not wholly worthless articles. There is demand for them and they have a value. Second, they were tied-in with sales to retailers who constitute the market for chicken gizzards, chicken skin, and chicken feet. If in fact they had no value on that market, evasion of price ceilings would be established. But since they apparently had some value on the retail market, no violation of price ceilings occurred unless the price charged for them in fact exceeded that market value. That might be shown either by proof of the fact that the market value was lower or by showing that the quantity forced on the retailers was in excess of the quantity which the market could absorb.

The case should be remanded for a new trial on that basis. For the trial court ruled that the additional articles sold were valueless and that the "one question in the case is whether the sale of the chicken skin and feet was a necessary condition to the purchase of the other." That ruling took from the jury the basic issue in the case.

I think there was evidence that these chicken gizzards, chicken skin, and chicken feet were valueless to some of the retailers and that a conviction would be warranted. But it is not enough that we conclude on the whole record that a defendant is guilty. *Bollenbach v. United States*, 326 U. S. —. The jury under our constitutional system is the tribunal selected for the ascertainment of guilt.

---

Mr. Justice RUTLEDGE, concurring.

I am in agreement with the result and substantially so with Mr. Justice MURPHY's opinion. I do not think that administra-

tive regulations, given by statute the function of defining the substance of criminal conduct, should have broader or more inclusive construction than statutes performing the same function. If the regulations involved here had been enacted specifically by Congress in statutory form, I do not think they could properly be construed to forbid tie-in sales of these commodities *per se*.

As the opinion points out, the regulations, with reference to other commodities, expressly prohibited tie-in sales, regardless of whether the tied-in commodity had value. Persons dealing in those commodities were specifically informed by the regulations, therefore, that such sales would be in violation of the Act. There was no such specific prohibition applicable at the time of the sales in question to sales of poultry. However the general prohibition against evasion contained in § 1429.5 of Revised Maximum Price Regulation No. 269 might be interpreted, if there had been no regulations specifically forbidding tie-in sales of other commodities, in view of their existence and the absence of any similar provision relating to poultry, I do not think it permissible to construe § 1429.5 as covering the same ground. Persons reading the regulations to determine what conduct had been forbidden were entitled in my opinion to conclude that the Administrator, whenever he thought tie-in sales were *per se* evasive or in violation of the Act's policy, had expressly so stated and conversely that where he had not expressly forbidden the practice, it was not to be understood as prohibited by general language applicable to many other types of situation but not specifically to this one. This view, I think, would be required if the regulations had been enacted in statutory form. As regulations they cannot be given broader content.

Accordingly I agree with the conclusion that tie-in sales were not forbidden at the time of these sales, as to poultry. I also agree that the trial court, both in its instructions and in some of its rulings upon the admissibility of evidence, went on a conception of the law inconsistent with this view. I therefore concur in the Court's disposition of the cause.

Mr. Justice FRANKFURTER, although agreeing with the opinion of Mr. Justice MURPHY, also joins in this opinion.



Mr. Justice BLACK, dissenting.

We were at war in 1943. Scarcity of food had become an acute problem throughout the nation. To keep the public from being gouged the government had set ceiling prices on food items. Congress had made it a crime to sell food above these ceiling prices. When Thanksgiving Day approached there were not enough turkeys to supply the demand of the many American families who wanted to celebrate in the customary style.

The information filed in the district court charged that the petitioner "unlawfully, wilfully and knowingly evaded the provisions of . . ." Revised Maximum Price Regulation No. 269, § 1429.5, by compelling and requiring the buyer to purchase chicken feet, chicken skin, or gizzards at a specified price, as a condition of the sale of poultry to them. During peace times the petitioner had ordinarily done a gross business of seven-and-a-half million dollars a year. In 1943, presumably due to the meat shortage incident to the war, the petitioner's gross business was not quite four million dollars. This meat shortage was felt acutely during the Thanksgiving season, when petitioner instead of his usual 100 to 150 cars of turkeys received only one car. When the retail butchers and poultry market proprietors came clamoring for their share of the small supply (which the defendant rationed among them) they found that along with the turkeys which they wanted so badly petitioner gave and charged them for large amounts of chicken feet, skins and gizzards which they had not asked for at all and which for the most part they had never before sold as separate items. While the butchers paid in addition to the ceiling price charged for the turkeys the price charged for the chicken skins and feet, they did so only because they understood that unless they bought these unwanted items they could get no turkeys. Only one of the butchers sold all the chicken skins to his customers. He explained that he operated his store in a poor neighborhood where the food shortage had become so acute that people were willing to buy anything they could get. As to the rest of the butchers, some simply dumped the chicken skins and feet while others, after diligent efforts, sold a few pounds and then gave the rest away either to their customers, or to charitable institutions. Certainly these particular butchers forced to buy these unwanted items for the first time were not the regular retail outlet for disjointed chicken feet and peeled chicken skins, if



there ever was such an outlet on a voluntary basis. It is clear therefore that as a result of petitioner's forcing his customers to buy the feet and skins along with the turkeys, the retailers' cost price of the turkeys was in effect increased beyond the ceiling.

In my opinion petitioner's practice in forcing the butchers to buy unwanted chicken feet in order to get wanted turkeys amounted to a direct violation of the Price Control Act. It certainly was no less a violation of the Administrator's regulation against evasion. In promulgating this regulation the Administrator could not possibly foresee every ingenious scheme or artifice the business mind might contrive to shroud violations of the Price Control Act. The regulation does not specifically describe all manner of evasive device. The term "tying agreement" nowhere appears in it and a discussion of such agreements is irrelevant. We need not decide whether what petitioner did would have violated every possible hypothetical regulation the Administrator might have promulgated. The regulation here involved prohibits every evasion of the Price Control Act. It thus condemns all actions that are "on the wrong side of the line indicated by the policy if not the mere letter of the law." *Buller v. Wisconsin*, 240 U. S. 625, 631. What petitioner did here is on the wrong side of both letter and policy. The Court does not deny that there was ample evidence to support the jury's finding that petitioner did what the information charged it with doing. In my opinion that was a crime.

Had butchers been required to buy bags of stones as a condition to buying turkeys, I think it would have been hard to persuade them, or anybody else, that the seller who forced them to do so was not guilty of violating and evading the law. Had people who wanted and needed bacon, at the time when bacon was almost impossible to purchase, been required to buy hog hoofs and hog skins with each purchase of a pound of bacon, I think the sellers would have violated the law. If the wholesaler can require the retailer to purchase unwanted items the retailer can force the ordinary consumer to do the same thing. A restaurant could then force its customers to purchase used kitchen fats along with their meals. It would be little consolation to a customer forced to do so to learn that soap factories can use these fats and would be willing to purchase them. He would pay the price, and either dump the fat into the nearest ashcan or tell the waiter to take

the smelly substance away. The result would be increased cost of meals in that restaurant. Thinly disguised subterfuges like the one here adopted should not be sanctioned by courts. Once they are sanctioned, laws enacted by Congress for the public welfare are no longer respected.

When food is scarce and people are hungry it is a violation, both of the letter and spirit of the Price Control laws, to require consumers or retail stores where they make their purchases, to buy things that they neither need nor want as a condition to obtaining articles which they must have. I dissent from the Court's disposition of this case.

Mr. Justice REED and Mr. Justice BURTON join in this opinion.